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ABSTRACT

This report is comprised of a series of articles that discuss two areas of dispute settlement -- negotiation impasses and representation and unit determination problems. Arvid Anderson concentrates on the growing utilization of compulsory binding arbitration and reviews its present use. Harold Davey discusses the principles of effective conflict resolution and emphasizes the use of mediation and fact finding in contract negotiation dispute settlement. Thomas Gilroy points up the need for finality in dispute settlement where the strike is not allowed and offers as a possible alternative "final selection" or "either/or" arbitration. Morris Slavney addresses himself to the problems of representation and the establishment of bargaining units, drawing upon his experience with these issues. (Author)

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Dispute Settlement in the Public Sector

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Editor

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Foreword

No issue in public sector collective bargaining has attracted as much attention as that of effective procedures for dispute settlement. While it has been effectively argued that there is an overemphasis on the phenomenon of strikes in public employment, and that more attention should be directed to the elements of successful bilateral negotiation, it remains true that dispute procedures are needed where negotiation fails.

The growing number of state statutes regulating public sector collective bargaining now provide a wide variety of dispute settlement approaches ranging from voluntary procedures agreed to by the negotiating parties to binding arbitration imposed by state law. The relative effectiveness of such methods as mediation, factfinding and arbitration is drawing increasing attention as various jurisdictions accumulate experience under different systems.

Two areas of dispute settlement are considered in this series of papers—negotiation impasses, and representation and unit determination problems. Focusing on negotiation impasses, Arvid Anderson concentrates on the growing utilization of compulsory binding arbitration and reviews its present use. Harold Davey discusses principles of effective conflict resolution and emphasizes the use of mediation and factfinding in contract negotiation dispute settlement. Thomas Gilroy discusses the need for finality in dispute settlement where the strike is not allowed, and he discusses as a possible alternative "final selection" or "either/or" arbitration. Morris Slavney addresses himself to problems of representation and the establishment of bargaining units, drawing upon his Wisconsin experience with these issues.

The Center wishes to express its appreciation to the authors contributing to this publication and to many others whose interest and support have made possible the research and publications program of the Center for Labor and Management.

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Compulsory Arbitration in Public Sector Dispute Settlement— An Affirmative View

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The topic of compulsory arbitration in public sector disputes is no longer an academic question. I have deliberately used the topic "compulsory arbitration" so as not to hide behind any semantic disguises such as "mediation to finality" or other euphemisms which are the equivalent of compulsory arbitration. I have no special preference for the phrase "compulsory arbitration;" I just don't want to mislead myself or the audience about the concepts we are discussing.

The march of events requires another look at the use of compulsory arbitration in public sector dispute settlement. Statutes in five states, Michigan, Pennsylvania, Rhode Island, Maine and Wyoming, now provide for compulsory arbitration of disputes over new contract terms for policemen, firemen and for certain other categories of public employees.[1] The new Postal Corporation Act provides for binding arbitration of new contract terms for some 750,000 federal employees.[2] The Public Service Staff Relations Act of Canada provides for compulsory arbitration of disputes over new contract terms for employees of the federal government of Canada.[3] Several Canadian provinces, including the largest, Ontario, have had binding arbitration of contract terms for policemen and firemen for 25 years.[4]

In addition to the binding arbitration statutes, factfinding and impasse panel procedures in a number of states have operated as the first cousin of compulsory arbitration and have been the equivalent of de facto arbitration, meaning the impasse panel proceedings are accepted by the public employer and public employee organizations. I realize in some instances, including a recent experience under the Office of Collective Bargaining statute, that some recommendations of impasse panels have been rejected, and that is one of the reasons compulsory arbitration is being considered

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[1] Maine, 51 GERR RF 2811; Michigan, 51 GERR RF 3114; Pennsylvania, 51 GERR RF 4719; Rhode Island, 51 GERR RF 4814, 4815; Wyoming, 51 GERR RF 5911 (firefighters only).

[2] Postal Reorganization Act of 1970, 41 GERR RF 11.

[3] Public Service Staff Relations Act, c.72 Canadian Stat.

[4] Ontario Fire Departments Act, Ch. 149, s.6, Rev. Stat. Ont. 1960; Police Act, Rev. Stat. Ont. 1960, c.298.

as a means of settlement. My point is that the recommendation for new contract terms by third-party neutrals through the use of impasse panel reports has encouraged the re-examination of arbitration as a means of contract dispute settlement.

In fact, impasse panel procedures may prove to be an interim step on the road to a system which features binding arbitration of contract terms in the public sector. In some cases, the parties have taken the additional step of agreeing to be bound by the recommendations of the impasse panel. In other instances, the parties have, in effect, requested the arbitrator to confirm their bargain by taking the responsibility of making an award confirming the agreement of the parties. There has also been an increase in the use of voluntary arbitration of contract terms in the public sector. Such arbitration is authorized by the Taylor Law.[5]

President George Meany of the AFL-CIO, while expressing strong reservations about the use of arbitration in the private sector for resolving bargaining impasses, has suggested the use of binding arbitration in some circumstances in the public sector. The procedure for binding arbitration of contract terms under the new Postal Corporation Act was endorsed by the AFL-CIO. Mr. Meany, in supporting the Postal Corporation Act, stated that any procedure which preserves workers' rights without strikes is acceptable.[6] Labor leaders who endorse the right to strike in public employment have at times qualified such advocacy by supporting binding arbitration of disputes for employees engaged in essential services such as law enforcement and fire fighting. In addition to the new laws and changed attitudes, the number of cases already submitted to arbitration in police and fire disputes in Pennsylvania and Michigan make an examination of compulsory arbitration procedures worthwhile.

The traditional attitudes of labor relations experts toward the binding arbitration process is that it's bad because it won't work and because it will destroy free collective bargaining. Arbitration of contract terms in public employment has been considered to be illegal in some jurisdictions because the process results in the unconstitutional delegation of responsibility to a third party, who is a private person of legislative and executive authority, to fix the terms and conditions of employment and the resulting budget changes and tax rates. Furthermore, it is charged that arbitration will not work because it will not prevent strikes or bring about settlements and will destroy the free collective bargaining process and the willingness of the parties to solve their own disputes. It is argued that compulsory arbitration will result in the piling up of all kinds of disputes to be submitted for resolution to a third party who neither understands the problems

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[5] New York State Public Employees Fair Employment Act (Taylor Law) §209.2.
[6] GERR 346, A-9.

nor has a continuing responsibility for the results of the settlement.

But if arbitration is bad, what are the alternatives? Is arbitration really that unsatisfactory compared to the lack of what the Taylor Law calls finality in New York City dispute settlement procedures, or as compared to the New York State finality procedures of appeal to the legislative body? It should be understood that New York City is under a statutory mandate to provide finality either by the Taylor Law finality route of appeal to the legislative body, the City Council or by some other means. Is arbitration so unacceptable when compared to strikes or job action, or, as I prefer the term, job inaction, in essential services? What is happening in the states which are now utilizing compulsory arbitration to resolve some public employment disputes?

The adoption of compulsory and binding arbitration statutes in such jurisdictions as Michigan, Pennsylvania, Rhode Island, Maine and Wyoming for police and fire disputes is based on the premise that since the right to strike is legally denied and cannot be realistically conferred on employees engaged in vital services, then a substitute bargaining balancer, the right to invoke binding arbitration by a neutral third party, is an effective and equitable substitute as a dispute settlement procedure. Arbitration transfers some of the powers of decision making about contract terms from the economic and political power of the parties involved to neutral arbitrators. Therefore, I don't accept the premise that the right to strike is the *sine qua non* to make the bargaining process work in the public sector. I think arbitration can work and has worked effectively for public employees as a substitute for the strike weapon.

At the same time, I have no illusions that a statute which confers a limited right to strike on most public employees could work effectively to regulate employment relations. Presently, such laws exist in Pennsylvania and Hawaii for the majority of public employees.[7] The Hawaii and Pennsylvania statutes will be the testing ground for the proposition that legalizing the right to strike for certain categories of public employees may serve as an effective strike deterrent and an equitable means of dispute settlement. The new statutes and procedures may actually prevent strikes in a more effective manner than banning strikes by law did. However, affording certain categories of public employees the right to strike as the means of resolving contract disputes may prove to be very expensive and ineffective for some public employees. For example, a strike of Internal Revenue Service agents, federal, state or local, would probably not gain much public sympathy or concern at this time. Also, when I listen to some of my friends in higher education who advocate the right to strike for employees

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[7] Hawaii, 51 GERR RF 2011; Pennsylvania, 51 GERR RF 4711.

of the State University system, I am inclined to say, "right on!" You will satisfy the militant students and you will satisfy the budget makers. Closing up the universities, even temporarily, may save an enormous amount of money. Thus, advocating the right to strike may be advocating the right to self-immolation for certain categories of public employees.

Obviously conferring the right to strike on policemen, firemen, doctors or nurses poses a different problem. I realize there are some who believe that the National Guard can cope with police strikes or possibly fire strikes and that volunteer fire departments can meet emergencies even in New York City; but I, for one, believe the complexities of modern society are such that we cannot play roulette with vital services. I believe the arbitration process presents a reasonable alternative to strikes by vital-services employees.

The Pennsylvania compulsory arbitration statute for police and firemen was adopted in June, 1968. Since that time, according to the records of a most distinguished and cooperative research assistant, Joseph Murphy, Vice-President of the American Arbitration Association, some 213 arbitration requests were filed in police disputes. The American Arbitration Association administers the arbitration procedures in Pennsylvania. There were 51 cases in 1968; 70 in 1969; and 92 in 1970. There have been 118 awards in police cases; 35 in 1968; 38 in 1969; and 45 in 1970. The balance of the cases were settled, withdrawn or are pending. Thus, nearly half of all the cases in which arbitration requests were filed were settled or withdrawn short of the arbitration process.

Professor Joseph Loewenberg of Temple University, writing in the *Arbitration Journal* on the Pennsylvania experience, reports that many of the parties who were involved in the compulsory and binding arbitration procedures in 1968 negotiated agreements in 1969 without resorting to arbitration.[8] Professor Loewenberg reports that two-thirds of the collective bargaining negotiations in major Pennsylvania municipalities were settled without compulsory arbitration in 1968, and over one-half in 1969. (Professor Loewenberg also presented a comprehensive paper on the subject of compulsory arbitration at the International Symposium on Public Employment Labor Relations in New York City on May 4, 1971.)

In Pennsylvania there was a significantly smaller number of fire arbitration cases than police cases. There were a total of 38 fire arbitration requests in three years with 23 awards, 13 settlements and two cases pending.[9] Thus, there has been a substantial use of the arbitration process in

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[8] J. Joseph Loewenberg, "Compulsory Arbitration and the Arbitrator," *Arbitration Journal*, Vol. 25, No. 4, 1970.

[9] Letter to the author from Joseph S. Murphy, Vice-President, American Arbitration Association, March 1, 1971.

Pennsylvania, but no strikes of which I am aware. The majority of cases have been resolved by direct bargaining of the parties or, at least, without the necessity of the issuance of awards.

In Michigan, Robert Howlett, Chairman of the Michigan Labor Mediation Board, advises that since the enactment of their compulsory arbitration statute in October, 1969, there have been 48 police and fire arbitration requests and 25 awards; 19 cases were pending, and four were settled.[10] That is a high proportion of awards to arbitration requests. But it must be remembered that in Michigan, as contrasted to Pennsylvania, there is a statutory mandate that mediation must be utilized before arbitration can be invoked. In Michigan, then, at least half of the cases in which mediation has been involved have resulted in agreements prior to the submission of the dispute to arbitration.

There have been two strikes in Michigan. In the case of one, the process was not used at all by the parties, and replacements for striking policemen were hired in Battle Creek, Michigan. In the case of the other which occurred in Marquette, Michigan, the employer refused to accept the arbitration award.

The third annual report of the Public Service Staff Relations Board of Canada states that, of 100 bargaining units under the federal scheme which elected to choose binding arbitration as a means of settlement of their contract differences, there have been in a three-year period only eight references to arbitration covering some 11 bargaining units.[11] Four were settled before the arbitration tribunal was established, and two were settled after the hearing, but before the award. Formal awards were made in two remaining cases. During this period of time, there was only one strike by non-supervisory employees of the postal department, who had elected to use the right to strike. Under the Canadian procedure, at least one month preceding the date on which the contract is to expire, employee organizations have the right to choose whether or not they wish to use the arbitration process or the strike route. The bargaining agent is free to alter its choice of dispute settlement procedures from one period of contract negotiations to another. Interestingly, under the Canadian federal system, only 14 out of a total of 114 bargaining units elected to use the strike weapon.

The Canadian annual report indicates that 75 percent of the agreements were achieved as a result of joint efforts by the parties in 108 bargaining units without recourse to third-party assistance or intervention and that 17 percent were settled with the assistance of a conciliator. The Chairman of

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10 Letter to the author from Robert G. Howlett, February 22, 1971.

11 Third Annual Report, Public Service Staff Relations Board, Ottawa, 1971.

the Canadian Board has made the observation that collective bargaining has not been adversely affected by the arbitration process. He added that the parties desired to make the arbitration process work at least in its initial round and with a recognition that the parties could always resort to the strike weapon in some future dispute if they were dissatisfied with the results of arbitration.

Professor Harry Arthurs of York University, a distinguished Canadian labor expert, has also supported the conclusion that the utilization of binding arbitration has not destroyed the collective bargaining process in Canada.[12] Professor Arthurs, in his paper prepared for the International Symposium on Public Employment Labor Relations, also reports on the experience of binding arbitration in police disputes and comments at some length on the Montreal police strike which was in part caused by dissatisfaction over the terms of a binding arbitration award. The Montreal incident with its appalling consequences is an important qualification to any impression that I might be making here that compulsory arbitration is a panacea, a sure-fire formula, that will guarantee peaceful and satisfactory resolution of public employee disputes. Arbitration is far from a perfect instrument; but the record so far in the jurisdictions where arbitration of contract terms is being implemented suggests that the process is working and can work well compared to other means of dispute settlement.

Michigan will determine this year whether the three-year experiment with police and fire arbitration will continue. Because of Michigan's legislative processes, it is necessary for the Michigan legislature to re-enact the Michigan binding arbitration statute for police and fire this year if it is to continue beyond June, 1972. The Michigan statute has come under sharp criticism from the Michigan Municipal League, but has been defended by the police and fire organizations. You will recall that the Michigan statute was enacted after Detroit experienced a bad case of "blue flu."

One of the criticisms of the existing police and fire statutes, which are tripartite in nature in Michigan and Pennsylvania, is that arbitrators are placed in a "win/lose" situation. In order to have a majority award, they must persuade either the labor or employer representative to agree with them. Aside from how uncomfortable choosing sides may make arbitrators, there is the lasting concept that a party wins or loses in a determination over new contract terms much in the same way that a party wins or loses a grievance arbitration. This procedure has caused some difficulties for the administrators of the Pennsylvania and Michigan statutes. Mr. Howlett has commented that a growing number of the tripartite awards are unanimous, but that one of the amendments that might be sought to the Michi-

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12 H. W. Arthurs, "Collective Bargaining in Public Service of Canada," *Michigan Law Review* (March 1969), 971, 990.

gan statute would put the labor and employer representative on the arbitration panel in an advisory rather than in an adjudicatory capacity. Thus, the neutral would not be compelled to agree with the position of either the labor or employer representative on any or all of the issues in dispute. He would be free to do so if he were persuaded that that was the right decision, but he would not be required to do so. Obviously, the neutral arbitrator's interest in acceptability of the award is a significant factor and may encourage the neutral to adopt the position of one of the parties if he is unable to persuade both of them to agree with him in a unanimous award. The difficulties of achieving unanimous awards in tripartite grievance arbitration cases help to illustrate the difficulties in obtaining a unanimous award for new contract terms.

Freeing the neutral from the necessity of getting a majority decision should encourage more equitable awards. For example, employer or union representatives might be in the position, politically, with their respective constituencies that they are unable to publicly compromise their positions. Thus, if the employer takes the public position that there should be no increase in wages or changes in pension benefits, while the union representative was taking the position that there should be a very substantial increase in both benefits, the possibility of compromise is remote.

The problem of majority awards in tripartite procedures is one of the difficulties that is inherent in the last-best-offer proposal for the resolution of certain emergency disputes. Obviously, the last-best-offer proposal has great merit where there are mature bargainers with sufficient authority, personal security and independence to be able to modify their position. In such situations the parties can bargain towards a settlement which obviates the need for an arbitration decision or so narrows the area of difference as to make the prospect for an acceptable award very high. However, if either party or both parties are in an inflexible position on a major issue such as manning, wages or pensions, the neutral may find himself in a position where he cannot issue an acceptable or even workable award. For if the arbitrator were to agree wholly with the union's position, the employer may be unwilling to accept the award; or the legislative body may refuse to implement the award; or if the arbitrator were to agree with the public employer, he may find that the union would be unwilling to persuade its members to accept the award or to abide by the determination. Professor Loewenberg reports on a survey of neutral arbitrators in Michigan and Pennsylvania which indicates that a number of the neutrals would have issued different awards if they were not compelled by law to have a majority decision.

The necessity of making an all-or-nothing choice also tends to negate the proper utilization of standards which have been included in the Michi-

gan and Rhode Island statutes for the guidance of the arbitrator. Such provisions include the comparison of total compensation of employees in the same governmental unit, nearby taxing units or communities of comparable size. Other factors include cost of living and ability to pay.

There is some indication that the detailed standards provided in the Michigan and Rhode Island statutes have induced the parties to come better prepared to the arbitration table and also to the negotiating table. The inclusion of standards is also a protection in the event of judicial review. The question of preparation is one dear to my heart as an administrator of an impasse panel procedure. While, in general, parties have been well prepared in dispute settlement cases, all too often they have come before a neutral and said, in effect, "Our hearts are pure. Our cause is just. You have been mutually selected and mutually paid by the parties. We know you would like to serve again—do right!"

The arbitration experience in Michigan and Pennsylvania will afford researchers an opportunity to study the impact of sharing the cost of arbitration, as is provided under the Michigan statute; under the Pennsylvania statute the public employer pays for all the cost of the arbitration, except for the arbitrator representing the public employees. It will be interesting to see whether the sharing of the cost, as provided in Michigan, when combined with the prior intensive use of mediation in that state, will result in a lower, long-run utilization of the arbitration process than in Pennsylvania where the employer is mandated to pay all of the cost of arbitration, and where there has been very little use of preliminary mediation as a means of dispute settlement.

A further basis for study will occur in Pennsylvania which has two arbitration statutes, one for police and fire enacted in 1968, and a more recent one enacted in October of 1970, which provides for binding arbitration for prison guards, mental hospital employees and court employees. The latter statute provides for the utilization of mediation prior to the imposition of arbitration. Why court employees are combined with prison guards and mental hospital employees in an arbitration statute may also be a subject for research by psychologists or psychiatrists, but more likely by political scientists. Rhode Island and Vermont also provide for the sharing of costs of arbitration.

While I have stressed the theme of compulsory arbitration, I want to emphasize, encourage and recognize that consent procedures are much to be preferred to compulsion in dispute resolution. To the extent that consent procedures can be built into a process which ultimately results in binding arbitration, if other means fail, they should be encouraged. The legislative proposals now pending before the New York City Council, which would provide for finality as mandated by the Taylor Law for dis-

pute resolution in New York City, involve many consent features.[13] For example, consent procedures are involved in the selection of neutrals who serve as members of impasse panels, who are mutually chosen by the parties and paid equally by them. Only in the event that the recommendations of an impasse panel are rejected would the dispute be referred, under the New York City proposal, to the tripartite Board of Collective Bargaining for a final determination. That tripartite body is again the creation, by mutual selection, of the public employer and of employee organizations.

The finality provision is tempered by two other significant provisions. The proposal recognizes that arbitration awards are not self-enforcing. In the event that the determinations of an impasse panel or the Board of Collective Bargaining require the enactment of a law by the City Council or the state legislature in order to implement the determination, such determinations cannot be placed into effect until the legislative body acts. This provision is consistent with the mandate in the Taylor Law which applies to all collective bargaining agreements regardless of whether or not any third party processes were involved. Such procedure recognizes both the political and perhaps legal necessity of involving the legislative body in a determination which affects important fiscal considerations. The legislative body would thus have the last voice; however, the dispute would be presented to the legislative body only if such action were necessary and with the connotation of finality.

A second qualification would provide for limited judicial review to insure that due process was afforded in the presentation of the dispute to the impasse panel or to the Board of Collective Bargaining. Whether or not the City Council will see fit to enact the proposals for finality as mandated by the Taylor Law, only the future can tell. Should the City Council fail to act, the state legislature or the courts ultimately will have to determine whether or not New York City procedures must be further changed to provide for finality, or whether they will be supplanted by state procedures for finality.

While the Public Employment Relations Board has not proposed binding arbitration for public employee dispute resolution, it has encouraged and supported the enactment of the New York City proposal as an experiment which should be tried. At the same time the PERB is seeking amendments to the Taylor Law procedures which will give the PERB a further hand to resolve disputes in the event of the rejection of impasse panel recommendations. Parties would be required, in effect, to show cause before the PERB why the dispute should not be settled. Such procedure is a further step toward binding determination of public employee dispute resolution.

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[13] New York City Council, Intro., No. 163.

Time has not permitted a detailed discussion of a number of legal problems involved with compulsory arbitration procedures. However, the highest courts of Pennsylvania, Rhode Island and Wyoming have upheld statutes in those states, and appellate courts in Michigan have upheld Michigan's compulsory arbitration statute. I also understand that the Michigan Supreme Court has upheld the constitutionality of that law.

The constitutionality of the Rhode Island statute has been upheld by that state's Supreme Court in a ruling which rejected a claim that the legislation was an invalid delegation of legislative power because it failed to provide sufficient standards to guide the arbitrators and because it delegated legislative powers to private persons.[14] The Court found that the statutes contained a number of standards sufficient to meet the constitutional requirement that delegated power be confined by reasonable laws or standards. On the question of delegation of powers to third persons, the court found that the arbitrators were public officers or agents of the legislature when they were carrying out their arbitration duties.

A constitutional amendment was required in order to enact the Pennsylvania statute. The Pennsylvania Supreme Court had ruled in 1962 that a constitutional amendment was necessary to provide for compulsory arbitration.[15] Thereafter, the Pennsylvania constitution was amended to provide that the General Assembly may enact laws which provide for compulsory arbitration of disputes in police and fire cases. The amendment further provided that arbitration shall be binding upon all parties and shall constitute a mandate to the heads of the political subdivision or to the appropriate officer of the Commonwealth, if the Commonwealth is the employer, with respect to matters which can be remedied by administrative action, and to the law-making body of such political subdivision or the Commonwealth with respect to such matters which require legislative action, to take the action necessary to carry out such findings. As a result of the constitutional amendment, a statute was enacted providing for compulsory arbitration of collective bargaining impasses involving policemen and firemen.

The constitutionality of this statute was subsequently upheld by the Pennsylvania Supreme Court against a challenge that the statute did not provide specific standards to guide the arbitrators.[16] The court ruled that the constitutional amendment providing that arbitration panels are to be commissioned, selected and are to act in accordance with law for the settlement of disputes involving policemen and firemen as a substitute for the

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14 Warwick v. Warwick Regular Firemen's Assoc., 256 A.2d 206 (S. Ct. of Rhode Island, 1969).

15 Erie Firefighters Local 293 v. Gardner, 406 Pa. 395, 178 A.2d 691.

16 Harney v. Russo, 435 Pa. 182, 255 A.2d 560 (1969).

right to strike, was a broad enough mandate to cover the question of standards to guide the arbitrators. The court held that there was no evidence there had been a denial of due process of law. The court also stated that even though the arbitration panel exercised functions that could affect the spending of public funds, this fact was not sufficient to make the arbitration panel a legislative one and thus subject to the principle of one-man, one-vote.

A particularly interesting aspect of the Pennsylvania case dealt with the question of ability to pay. The court commented that, "If we did hear a case in which the tax millage as a matter of record could not be permissibly raised as to provide sufficient funds to pay the required benefits to the employees, it would still be open to the court to rule that the act impliedly authorizes a court to approve the tax increases necessary to pay the arbitration award or to hold that the municipal budget must be adjusted in other places in order to provide resources for policemen or firemen salaries." The court thus clearly hints that it might mandate the imposition of a tax or the re-allocation of a municipal budget in order to implement an arbitration award. This reasoning apparently equates an arbitration award with a debt.

This comment by the court recognizes that arbitration awards are not self-enforcing and that while awards may be declared by the legislature to be final and binding, the fact is that an arbitration award of contract terms is not self-enforcing.

While legal questions are important, I believe the overriding questions are whether the process will work and whether the process is desired by the parties and the public. If the answers are "yes," the lawyers will be able to figure out how to get things done as well as how not to take action.

In summary, compulsory arbitration is receiving intensive testing as an effective and equitable means of dispute settlement in the public service. What the long-range impact will be on the collective bargaining process remains to be seen. The early evidence is that compulsory arbitration is working to resolve disputes and that it has not harmed or destroyed the collective bargaining process.

Dispute Settlement in Public Employment

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THEME AND COVERAGE OF ANALYSIS

Collective bargaining is still a comparatively new and strange process for most government agencies and the representatives of their employees in the United States at all levels of government. The decade of the 1960's will be long remembered as the period in which an upsurge of unionization among public sector employees took place, catalyzed in great part by the late President Kennedy's Executive Order 10988 in January, 1962.[1] The momentum of unionization will be sustained in the 1970's.[2]

The public sector remains so fluid and dynamic from a labor relations standpoint that generalization and prediction are both hazardous. Twenty-five or more states have enacted legislation covering public sector labor relations. These statutes reflect a wide variety of approaches to the problem areas that distinguish collective bargaining in the public sector from its counterpart in the private economy. Many of the major municipalities in the U.S.A. also have developed special procedures for dealing with union recognition, unfair practices, dispute settlement and other problems.[3]

This paper is concerned solely with effective means of dispute resolution in the public sector. Dispute settlement overshadows all other problem areas because of the widely held view that government employees should not have the strike instrument available to them as a means of producing

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1 Although designed to encourage employees at the federal level to bargain collectively with government agencies, the Kennedy order had a visible, stimulating impact on employees of state and local government, particularly among teachers, policemen, firemen, and many varieties of blue collar and white collar workers. Expansion of union activity and collective bargaining at the federal level was given another boost by President Nixon's Executive Order No. 11491, issued in October, 1969. This order clarified and strengthened E. O. 10988 in several important respects.

2 There is near unanimity among the experienced public sector "watchers" on this point. To cite just one example, the most rapidly growing union in the United States is the American Federation of State, County and Municipal Employees (AFSCME), an AFL-CIO affiliate.

3 For a recent comprehensive analysis of municipal labor relations problems and experience, see Robert H. Connery and William V. Farr, eds., *Unionization of Municipal Employees*, Montpelier, Vermont: Capital City Press, 1971.

agreement in bargaining with government agencies over the terms of future contracts. To my knowledge, only Hawaii and Pennsylvania have general legislation permitting a qualified right to strike after several layers of dispute-settling machinery have been exhausted.[4] The federal government and most state laws on the subject stipulate flat prohibitions against striking and also comparatively severe to harsh sanctions against those who violate such prohibition.[5]

The literature on public sector labor relations reflects an almost morbid preoccupation with the strike issue. The literature is already so extensive[6] that one should have a valid excuse for writing one more essay on dispute settlement. The writer's rationale for doing so is based on the theme of this analysis which can be stated in the following terms:

1. Bargaining can be meaningful in the public sector without the strike if government agencies and the unions or associations representing their employees will learn that the best way to improve their bargaining relationships is by bargaining and not by turning over the job to professional neutrals;

2. When good faith bargaining has failed to produce an agreement, neutrals should be used in ways that will keep the pressure on the bargaining parties to reach their own solutions whenever possible.[7]

The theme and the analysis rest on what I believe to be realistic, pragmatic assumptions about public sector labor relations in the United States at all levels of government: federal, state and local.

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[4] Pennsylvania, however, makes a conspicuous exception of policemen, firemen and employees of state mental hospitals. Separate legislation provides for compulsory arbitration of future terms disputes involving policemen or firemen. It is my understanding that Vermont has a special law governing teacher labor relations that provides for a qualified right to strike.

[5] Although it is a truism that statutory prohibition of strikes by government employees does not insure that strikes will not occur no matter how severe the sanctions may be, nevertheless emotionalism on this issue is at such a generally high level that realism compels the conclusion that usage of the strike weapon will continue to be prohibited at the federal level and in most state statutes for *any* public sector employees, whether or not their occupations are deemed to be "critical" in nature such as those of policemen and firemen.

[6] Even a selective bibliographical footnote would be longer than this entire article. In lieu of multiple citations here, the reader's attention is recommended to an excellent, comprehensive bibliography prepared by Helene R. Shimaoka, librarian of the University of Hawaii's Industrial Relations Center, entitled *Bibliography, Public Employee Collective Bargaining*, published by the Center in July, 1971.

[7] For more extensive discussion of the theme of *non-usage* of neutrals see Harold W. Davey, "The Use of Neutrals in the Public Sector," *Labor Law Journal*, XX (August, 1969), pp. 529-538. See also Harold W. Davey, *Contemporary Collective Bargaining*, 3rd edition, Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1972, Chapter 13, pp. 340-379.

ASSUMPTIONS OF THE ANALYSIS

The assumptions of this analysis may be stated as follows:

1. Economic force will *not* be available to the parties as a means of producing agreement, either during the life of an existing contract or, in case of an impasse, over what terms shall be embodied in a future contract.

2. Economic force under any other name or subterfuge will not be available. I refer to such tactics as "coincidental" illness of large numbers of employees at one time (e.g., the "blue flu" tactic of policemen), or "job action" (a recent euphemism for slowdown or mass absenteeism).

3. In the early years, collective bargaining often will be operating with the handicap of relative inexperience and lack of expertise on both sides of the table.

4. For some years to come, government agencies and employee representatives will experience difficulty in impasse situations caused in part by the relatively short supply of neutrals with public sector experience. This difficulty is compounded by the fact that many experienced private sector neutrals are not readily available for public sector use, nor will the latter necessarily be effective in the public sector.

5. Public sector bargaining operates under special constraints not present in the private sector because of statutory limitations on the scope of collective bargaining, such as "pre-emption" of certain bargaining issues by federal and state civil service and classification systems.

With the foregoing assumptions and constraints in mind, we are now in a position to do the following:

1. Set forth some basic principles for effective dispute resolution, borrowing when feasible from private sector experience.

2. Evaluate in specific terms dispute settlement procedures which appear to be most likely to prove effective.

3. Draw some tentative conclusions from the analysis as to the most essential requisites for constructive, mature public sector labor relations and make some predictions as to the shape of the future.

BASIC PRINCIPLES OF EFFECTIVE CONFLICT RESOLUTION[8]

We still lack an acceptable general theory of labor relations conflict resolution. Possibly this is because no one has yet been persistent and imaginative enough to develop such a theory, or perhaps it is because human conflict in all its manifestations is too varied and unpredictable to make a useful general theory feasible.

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[8] For a recent, thoughtful analysis by one of the most talented and experienced mediators in the field, see William E. Simkin, *Mediation and the Dynamics of Collective Bargaining*, Washington, D.C.: The Bureau of National Affairs, Inc., 1971, *passim*.

Two colleagues and I have already put in an impressive number of man-hours reading scholarly contributions to conflict resolution theory in a variety of different disciplines.[9]

We continue to remain hopeful about the realistic possibility of developing such a theory. Our current emphasis is on searching for the essential components of that theory.

One valid reason for hope is that a great deal has been learned about how to cope effectively with certain types of labor relations conflict situations. I shall list a few of these "knowns" here. They should be of some value (and, perhaps, comfort) to those in the public sector who are fearful, apprehensive and/or hostile as they face up to the task of bargaining collectively for the first time.

It is human to fear and distrust the unknown. However, there is much that *is* known. *Something of value can be absorbed and learned from private sector labor relations experience.*

To come directly to the point, what can we say we have learned about conflict resolution (dispute settlement) in the private sector? The logic of experience justifies being reasonably sure of the validity of the following basic principles:

1. Joint understanding and acceptance of the fact that certain types of conflict situations are *normal* and *natural* in collective bargaining is an essential first step toward more effective conflict resolution.

2. Joint understanding and acceptance of the fact that it is generally to the advantage of *both* the employer *and* the union to resolve disputes peacefully by established procedures is an essential prerequisite to effective utilization of such procedures.

3. Recognition that conflict resolution is a complex, difficult task in most employer-union relationships. It is not a job for amateurs, hotheads or emotionally immature persons. It requires mature personnel with professional know-how on both sides of the bargaining table.

4. Recognition that resolution of conflicts arising during the life of an agreement is best accomplished through a negotiated grievance and arbitration procedure wherein a joint effort is made to adjust and settle all grievances and complaints in the earlier steps of the procedure *on their merits under the contract.*

5. Joint understanding that in grievance arbitration it is desirable for

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[9] John F. Duffy of the Psychology Department of the State University of New York at Binghamton, is reviewing the relevant literature in his area applicable to labor relations conflict resolution. Gary P. Abbott, doctoral candidate in Industrial Relations at the University of Illinois, is performing a similar task in the literature of sociology and organizational behavior. The writer is facing up to the task of reviewing pertinent literature in law, economics and political science. It is perhaps unnecessary to state that this is a *long-term* project.

the arbitrator's authority and jurisdiction to be congruent with the scope of the contract's no strike-no lockout provision. The arbitrator's decision must be jointly recognized as final and binding on the employer, on the union and on the employees covered by the contract.

6. In seeking to resolve conflict over the terms of future agreements, appreciation on the part of both the employer and union of the long-run wisdom of peaceful solutions whenever possible. When an impasse situation occurs, every effort should be made to avoid the use of economic force as a means for resolving the dispute. This is of obvious special importance in public sector situations. However, whether private or public, both parties must remember that they will be living together under whatever terms are ultimately agreed upon. Such knowledge is crucial to the avoidance or misuse of economic force during the conflict period.

7. Joint recognition that a "good" settlement is one from which both parties justifiably feel they have gained something of value from all the travail they have experienced. In conflict resolution of any kind, the psychological impact on the participants is frequently of greater importance than any substantive gains (losses) that may be achieved or suffered.

EFFECTIVE APPROACHES AND PROCEDURES FOR DISPUTE SETTLEMENT

The basic principles just outlined provide ample clues to what will be recommended hereafter as procedures likely to prove effective in dispute resolution. The focus in the present section is principally on state and local government labor relations rather than on federal.[10]

There are some general considerations that make sense in terms of the constraints operating on public sector bargaining. These include the following:

1. Long-run wisdom suggests the desirability of government agencies and unions or associations of employees developing their own experts in both contract negotiation and administration. The short-run expense and difficulties of such an approach will prove to be worth the effort. The ultimate result will be a reduced need for the expensive and time-consuming use of neutrals in impasse situations.

2. When good faith bargaining fails to produce complete agreement on future contract terms, the best procedures for impasse resolution are those that are basically simple, that involve use of talented neutrals and

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10 The emphasis is based mainly on space constraints. It should not be interpreted as a minimization of the importance of federal public sector labor relations. On the contrary, the evolution of collective bargaining relationships at the federal level will doubtless have significant impact, directly or indirectly, on the nature and shape of state and municipal labor relations.

that are designed to keep responsibility for ultimate solution of the problem(s) involved on the backs of the negotiators.

3. If these first two considerations are followed, the ultimate consequence will be that most future terms disputes will be resolved through collective bargaining. Those that require the assistance of a neutral should be amenable to resolution through the mediation process in all but a few extreme cases. In this latter contingency, my preference is for legislation to provide that the dispute go directly into either final and binding arbitration or to factfinding with recommendations, accompanied by a show cause procedure operating against the party not accepting the factfinder's recommendations.

SKILLED MEDIATION AS THE OPTIMAL USAGE OF NEUTRALS[11]

Assuming that *some* disputes will remain unresolved even with optimal good faith bargaining, the most effective way to use a neutral is as a mediator. If the mediator is a professional, a satisfactory contract can usually be arrived at with his aid. All too often, the parties make only perfunctory use of mediation in their unseemly haste to get on to the factfinding stage.[12]

Most future terms disputes can and should be resolved by direct collective bargaining between the parties. Those that are not so resolved should be amenable to successful mediation in all but the most extreme situations. Only as a last resort should the parties move on to factfinding. When this is done, the factfinder should have the power to recommend and also the discretion to mediate a solution if he sees a possibility of doing so.[13]

The mediator can help to bring the parties together by reminding them that he or she represents their last best chance of reaching a solution that is not in some sense an imposed solution. We are also assuming that the mediator has the requisite professional skills and experience to perform

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[11] It should be understood that the subjective conclusion of this heading represents a value judgment on the writer's part.

[12] This generalization is supported, for example, by experience in teacher disputes in New York State. Harold Rubin has noted ". . . an increasing use of impasse mechanisms with their resulting problems. Thus, during the first eight months of 1970, 443 out of some 1,500 settlements involving school districts in New York State went to impasse. Of these, slightly more than half involved factfinding." See his paper entitled "Labor Relations in State and Local Governments" in the Connery and Farr volume cited *supra* in footnote 3, pp. 14-28.

[13] This is a value judgment not shared by many public sector experts such as Robert G. Howlett, Chairman of the Michigan Employment Relations Board. Howlett's views, however, are conditioned by an assumption that collective bargaining and mediation have been thorough prior to the factfinding procedure.

well his or her own role. The mediation function is one of the most difficult of interpersonal functions.[14]

If the parties know that failure to resolve their dispute with the mediator's help will throw them into an actual compulsory or semicompulsory situation, this should serve to give the mediator a little more "clout" than he now has in most public sector situations. It should also be of value in discouraging the parties from merely going through the motions with the mediator in order to reach the next procedural layer, usually factfinding.

From my viewpoint, optimal behavior would be conflict resolution directly by the parties on their own. However, realism compels recognition that the services of professional neutrals will be necessary in some cases. The objective of the parties in any such case should be to make every possible effort to reach agreement with the help of the mediator as a neutral professional.

Should mediation fail, my current thinking favors the simple, direct and unambiguous approach of going to final and binding arbitration of unresolved future terms issues. My thinking on this takes a hard or tough turn where the public sector is involved, although I still would be reluctant to endorse such an approach for resolution of private sector disputes.[15]

If binding arbitration is rejected in favor of factfinding with recommendations, I believe it is imperative that factfinding machinery be given more decisive weight through the mechanism of a show cause procedure as discussed in a subsequent section of this paper.

A principal factor favoring either binding arbitration or factfinding with more "muscle" than is now customary is that this may serve to underline to the parties the superior wisdom of "doing their own thing" (i.e., bargaining out a final solution) or, at the very most, ending their dispute at the mediation step.

FACTFINDING WITH RECOMMENDATIONS AND MEDIATION FLEXIBILITY

A factfinder with no power to recommend is a paper tiger. A factfinder

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14 For further discussion see William E. Simkin, *op. cit.*, cited *supra* in footnote 8.

15 There is some evidence, however, of a growing disposition on the part of employers and unions in the private sector to consider favorably the use of binding arbitration for future terms disputes in lieu of economic force. For example, I. W. Abel, President of the United Steelworkers of America, spoke favorably of future terms arbitration as a possibility in the 1971 steel negotiations. His view did not have to be tested, however, as an agreement was reached with Big Steel effective August 1, 1971. For an academic analysis of trends and prospects of future terms arbitration, see Jack Stieber, "Voluntary Arbitration of Contract Terms," in Gerald G. Somers, ed., *Arbitration and the Expanding Role of Neutrals,* Washington, D.C.: Bureau of National Affairs, Inc., 1970, pp. 71-124.

who must refrain from developing a mediated solution is playing the neutral's role with one hand tied behind his back.

This is not to suggest that there is no place for arms-length formal factfinding in situations where the factfinding step has been preceded by genuine collective bargaining and earnest but unsuccessful mediation. When the parties have engaged in hard bargaining and have also made full use of a talented mediator and yet remain in an impasse situation on one or more tough issues, the better part of wisdom is for the factfinder to assume agreement is not in the cards. In many cases, however, the evidence suggests that the parties have done little or no bargaining and have not made good use of the mediator's services. A factfinder faced with this situation should be an unhappy man (or woman) unless he is prepared, and has the authority to get tough with the parties, either by forcing them back to the table or by mediating out of the dispute as many issues as possible.

Any alumnus or alumna of National War Labor Board tripartite panel disputes service during World War II can testify to the frustrations and hazards in trying to work out a settlement or solution in cases where virtually the entire contract was in dispute. In most instances the parties would be directed to return to the bargaining table in order to reduce their dispute to manageable proportions. In some cases this was done with the assistance of a National War Labor Board "special representative."

A public sector factfinder needs the same wisdom and authority. When one attempts to "find facts" and to make recommendations on an entire disputed contract, in effect this amounts to condoning the effort of one or both parties to avoid the duty to bargain. Procedures for the use of neutrals should be so constructed and used that the collective bargaining monkey remains on the backs of the parties. The government agency and the union or association with which it bargains should never be allowed to forget that *the responsibility for bargaining to finality is theirs.* The neutral who permits himself to be excessively used as a contract writer is performing a disservice to the labor relations process.

Neutrals can and do perform valuable functions in true impasse situations. The fact is, however, that both mediation and factfinding are often invoked too soon. When the neutral finds himself in such a case he should be "hard-nosed" in reminding the parties that collective bargaining is designed to be a bilateral process. It is a difficult process at best. It cannot be learned by passing the buck to neutrals, no matter how experienced or talented they may be.

Assuming a genuine impasse with a manageable number of issues in dispute, should the factfinder conduct proceedings in a quasi-judicial manner akin to formal grievance arbitration or should he explore the possible basis for a mediated solution of one or more of the disputed issues?

Factfinders should have the discretion to mediate in "premature" situations. However, a factfinder who embarks on mediation should be confident that he can succeed, i.e., bring off a complete settlement.

A factfinder who mediates and fails is probably worse off than one who has not tried. One or both sides have probably revealed to him in confidence their true, realistic positions on the disputed issues. Thus, his ability to revert to a quasi-judicial role is likely to have been impaired, if not destroyed.

What does all this add up to in the final analysis? The first "lesson" perhaps is that there are no sure-fire procedures for impasse resolution. It also should be evident that impasse procedures should not ordinarily be made available in situations where no real collective bargaining has taken place.

To put this same point in another way, *the use of neutrals should be made difficult, not easy.* We are in no position to make careless, time-consuming use of an admittedly short supply of neutrals, whether as mediators, factfinders, advisory arbitrators or binding arbitrators.[16]

Neutrals should not be used at all in any capacity unless and until the parties have exhausted the possibilities of reaching an agreement on their own.

Perhaps because of my unfamiliarity with public sector peculiarities, I can see no pressing need for the many procedural layers built into most of the statutes currently on the books. I would prefer a clear-cut progression along the following lines:

1. A collective bargaining period extending for not less than 120 days before budget submission deadlines.
2. Intensive mediation of any issues that may remain unresolved 60 days before budget submission deadlines.
3. If a complete contract has not been achieved 30 days prior to budget submission deadlines, the statute should provide for submission of any unresolved issues to final and binding future terms arbitration.
4. If binding arbitration is not acceptable, alternatively a single factfinder or a tripartite or all-public factfinding panel can be used as the final procedural step. The power to recommend must be clear-cut, with a show cause procedure in the event of failure to comply.

FACTFINDING RECOMMENDATIONS BACKED BY SHOW CAUSE PROCEDURES

The concentration so far has been on factfinding with recommendations rather than on binding arbitration. This is in recognition of the political

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16 For fuller discussion see Harold W. Davey, "Restructuring Grievance Arbitration Procedures: Some Modest Proposals," *Iowa Law Review*, 54 (February, 1969), pp. 560-578; and "Use of Neutrals in the Public Sector," *Labor Law Journal* (August, 1969), cited fully in footnote 7, *supra*.

realities. It is evident that neither the parties nor most state legislatures are ready to "buy" binding arbitration on future terms impasse situations —unless perhaps for certain special categories such as policemen and firemen.

If this is a correct assessment, the problem becomes how to make factfinding with recommendations work well in providing a "final solution" to impasses. The most logical approach, in my view, is to provide by statute for a judicial show cause procedure if the recommendations of the single factfinder or a factfinding panel are not accepted within a specified length of time by one or conceivably both parties.

In the typical situation, one party will accept. The other party may have been so alienated by the recommendations as to reject them in whole or in part. If this is the case, I would urge, as a matter of law, that the burden of proof for failing to observe factfinding recommendations be placed squarely on the shoulders of the rejecting party in a judicial show cause proceeding.

The scope of judicial review would be carefully defined and limited. This would preclude the court's substituting its judgment for the factfinder(s) on the substantive merits of the recommendations.

Reversal or disallowal of factfinding recommendations would be possible only under unusual circumstances. One example might be a showing that the factfinder (or factfinding panel) had gone beyond the parameters of discretion set forth in a submission agreement on the disputed issue(s). Another might be a showing that some subject had been covered in the recommendations that was not in fact a matter between the parties and thus had not been submitted to factfinding.

In the absence of extraordinary circumstances of such a nature, failure to comply with a show cause order or failure to prove cause for judicial modification or reversal of factfinding recommendations would then subject the party in question to contempt of court and subsequent punishment as determined by said court.

CONCLUSIONS

What can be said about labor dispute settlement in the public sector by way of conclusion? We have stressed the comparative recency and strangeness of public sector bargaining. In this connection, it should be noted that government employee bargaining has been a well-established institutional process for many years in Canada, the United Kingdom, and many Western European and Scandinavian countries.[17] The U.S.A. is clearly a "late bloomer" in this area of labor relations.

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[17] For a brief comparative analysis, see Everett M. Kassalow, *Trade Unions and Industrial Relations: An International Comparison,* New York: Random House, Inc., 1969.

This fact alone suggests the wisdom of thorough comparative analysis of the relevant experience of other countries. We can learn and profit from "mistakes" already endured and, in most cases, corrected in the experiences of other nations. An important beginning in this direction was made in May, 1971, by the international conference on comparative public sector labor relations held in New York City.[18]

Returning to our internal, introspective orientation we should re-emphasize briefly the following key points:

1. Government agencies and unions or associations representing their employees should learn collective bargaining by bargaining themselves to final solutions, thus avoiding the need for the services of neutrals whenever possible.

2. The public sector parties should avoid assuming that their problems are unique to the point that they ignore the opportunity to learn from private sector experience and from public sector experience in other countries.

3. Finally, and most importantly, public sector bargainers should avoid being victimized or traumatized by fear of the unknown or by excessive concern over their lack of expertise. Everybody has to start somewhere. If the truth be known, there are *few* genuine experts.

Most of the "experts" are not that many jumps ahead of those who modestly regard themselves as amateurs. The writer's propensity toward hortatory prose does not stem from true public sector expertise but rather from extensive private sector experience. This is combined with a strong interest in what kinds of know-how are transferable to the public sector scene.

The blueprint of this essay stresses simplicity in procedures and reliance on developing one's own expertise rather than becoming overly dependent on outsiders, whether as negotiators or as neutrals.

Expertise is always a relative proposition. It can be acquired by willingness to learn, by diligent study and, most important of all, through genuine

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On teachers in particular, see a comparative study edited by Albert A. Blum, entitled *Teacher Unions and Associations: A Comparative Study,* Urbana, Ill.: University of Illinois Press, 1969.

[18] Several excellent publications should emanate from this conference. The reader with comparative interests may find the following citations to be of particular interest. All were published by the Institute of Labor and Industrial Relations, The University of Michigan–Wayne State University in 1971. H. W. Arthurs, *Collective Bargaining by Public Employees in Canada: Five Models;* Gerald E. Caiden, *Public Employment Compulsory Arbitration in Australia;* Alice H. Cook, Solomon B. Levine and Tadashi Mitsufuju, *Public Employee Labor Relations in Japan: Three Aspects;* B. A. Hepple and Paul O'Higgins, *Public Employee Trade Unionism in the United Kingdom: The Legal Framework;* Harold M. Levinson, *Collective Bargaining by British Local Authority Employees;* William H. McPherson, *Public Employee Relations in West Germany;* and Frederic Meyers, *The State and Government Employee Unions in France.*

"on-the-job training" by functioning in the bargaining process. It should be conceded, however, that not all individuals have the proper personal chemistry for labor relations. Knowledgeability *and* the right personal chemistry are both essential.

I use the term "personal chemistry" to describe such requisites in labor relations as the ability to see the other party's problem and the pressures operating upon him; the ability to "keep one's cool" in emotion-packed circumstances; a fund of patience and personal stamina; and, finally, a genuine willingess and capacity to reach agreement at the bargaining table.

The final prognosis here is essentially optimistic, notwithstanding the currently turbulent, contradictory and often confusing public sector scene. *Some* growing pains are unavoidable and must be endured. Others can be avoided and will be avoided as maturity eventually triumphs over expediency and emotionalism.

We still have much to learn about dispute settlement and other problem areas in public sector labor relations. But we have already learned a good deal about the nature and limitations of factfinding as a process.[19]

Dispute settlement, in my view, may prove to be progressively less difficult in the public sector because of a sense of *shared responsibility for effective service* that is not always present in the private sector.[20] Perhaps such optimism proves my naïveté. I prefer to think that it constitutes the value judgment of an "expert."

A BIBLIOGRAPHICAL POSTSCRIPT

In public sector labor relations, nearly everybody concerned seems to be attending conferences and/or writing papers for delivery at such conferences. So many people are involved in this business of taking in each other's washing that one wonders how a corporal's guard can be mustered to man a rousing public sector dispute.

The literature already staggers the imagination. It overtaxes the ability of anyone to keep up. I would therefore like to note four reporting services that I have found helpful in keeping abreast of what is new in this dynamic area. In alphabetical order, the four services are as follows:

1. American Arbitration Association, *Labor Arbitration in Government*, edited

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[19] For example, see the study by Byron Yaffe and Howard Goldblatt, *Fact-Finding in Public Employment Disputes in New York State: More Promise than Illusion*, Ithaca, N.Y.: New York State School of Industrial and Labor Relations, Cornell University, 1971. See also, William E. Simkin, "Fact-Finding: Its Values and Limitations," in Gerald G. Somers, ed., *op. cit.*, cited *supra* in footnote 15, pp. 165-186 (including comments by Robert G. Howlett and Jacob Finkelman).

[20] See Harold W. Davey, *Contemporary Collective Bargaining*, 3rd edition, Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1972, pp. 365-366.

by Morris Stone, Earl R. Baderschneider and Steven Laine Goldstein, published on a monthly basis.

2. American Arbitration Association, *Labor Arbitration in Schools,* edited by Morris Stone, Earl R. Baderschneider and Steven Laine Goldstein, published on a monthly basis.
3. Bureau of National Affairs, Inc., *Government Employee Relations Reports,* published on a weekly basis.
4. Labor-Management Relations Service of the National League of Cities, United States Conference of Mayors and National Association of Counties, *LMRS Newsletter,* published on a monthly basis.

Finality and Final Selection

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As the incidence of employee organization and collective bargaining in the public sector has grown, the search for effective dispute settlement techniques has steadily intensified. A growing number of states are enacting legislation including procedures for resolving contract negotiation disputes.[1] A pattern has developed in which most of these states ban all strikes and provide for mediation and factfinding to resolve interest disputes.[2] While early assessments of the effectiveness of these procedures seem cautiously positive, one of the major problems remaining is the lack of a "final" procedure where mediation and factfinding have not produced a settlement. The purpose of this paper is to analyze the problem of finality in public sector dispute settlement and to assess the prospects of a "final offer selection" procedure as a solution to this problem.

THE GROWTH OF MEDIATION AND FACTFINDING

Based on his 1971 study, Simkin reports that in 1968 there were about 1,100 cases in which neutrals were used in mediation and factfinding at the state and local levels.[3] He also found that the 1968 case load was greater than the total of all years prior to 1968.[4] The same study reported 332 mediation and factfinding cases in New York State for 1968 while the 1969 figures reported in another study of New York State showed an increase to

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1 As of August, 1971, 34 states had enacted such laws:

Alaska	Iowa	Montana	Pennsylvania
California	Kansas	Nebraska	Rhode Island
Connecticut	Louisiana	Nevada	South Dakota
Delaware	Maine	New Hampshire	Vermont
Florida	Maryland	New Jersey	Washington
Hawaii	Massachusetts	New York	Wisconsin
Georgia	Michigan	North Dakota	Wyoming
Idaho	Minnesota	Oklahoma	
Illinois	Missouri	Oregon	

2 Twenty-five states provided for mediation, and 22 provided for factfinding.

3 William Simkin, *Mediation and the Dynamics of Collective Bargaining*, Washington, D.C.: Bureau of National Affairs, Inc. (1971), p. 337.

4 Ibid.

over 800 cases.[5] The reports of a number of state agencies confirm this growing use of both mediation and factfinding.

Mediation has been the most frequently used interest dispute procedure in most jurisdictions and is considered by many to be the most successful procedure. In 1970, the New Jersey experience was that 70 percent of the disputes going to a neutral were settled in mediation, and in New York State in 1970 about 50 percent of the impasse cases were being settled in mediation.[6] The mediation process has an impressive list of supporters testifying to its effectiveness as a public sector dispute settlement procedure. One of its strongest supporters has argued that "properly timed professional mediation should be noted as the most desirable (least undesirable) form of third-party intervention. . . . In most cases requiring third-party participation—mediation—should be the only procedure needed for final solution of the dispute."[7] Simkin has also endorsed mediation as the most effective means of dispute settlement.[8]

Although rarely used in private sector labor relations, factfinding has been used considerably in the public sector. Its acceptability is largely due to the search for a substitute for the strike, short of imposing a settlement on the parties. It provides a stronger role for the neutral(s) as compared to mediation, without usurping the parties' rights to reject the settlement as recommended by the third party. Moreover, in some jurisdictions, it is a flexible process in which the neutral(s) can combine the role of mediator(s) and factfinder(s) and opt to either adjust or adjudicate the dispute. As noted earlier, nearly as many state laws now provide for factfinding as they do mediation.

The effectiveness of factfinding by policy makers may also be due in

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5 Byron Yaffe and Howard Goldblatt, *Factfinding in Public Employment in New York State: More Promise than Illusion,* ILR Paperback No. 10, Ithaca, N.Y.: Cornell University (June 1971), p. 18.

6 Louis Aronin, "The New Jersey Experience," and Robert Helsby, "Resolution of Public Sector Disputes," *Proceedings of the Conference on Government Employment and Collective Bargaining: Hawaii PERB: Year One,* Honolulu, Hawaii: University of Hawaii, Industrial Relations Center (December 1970) 16.

7 Harold Davey, "The Use of Neutrals in the Public Sector," *Proceedings of the 1969 Annual Spring Meeting of the Industrial Relations Research Association,* Madison, Wisconsin: Industrial Relations Research Association (August 1969) 534.

8 Simkin, *Collective Bargaining,* 347-348. Also see Willoughby Abner, "The FMCS and Dispute Mediation in the Federal Government," *Monthly Labor Review,* 92:5 (1969) 28-29. Mr. Abner points out that the imposition of time limits by federal mediation when assuming the role of mediator in federal service negotiation impasses has led to bitter experiences in gaining settlements and concludes that mediation was working well in the federal sector even before the FMCS was specifically given authority in such disputes.

part to the fact that it may exert additional pressure for settlement by having the neutral's recommendations made public. Further, in some states, the party rejecting the recommendations must "show cause" why such a rejection was made.

The effectiveness of factfinding is now under evaluation in a number of jurisdictions. Enough experience has now been accumulated in different states to make preliminary assessments of this procedure possible. Estimates have been made that 90 percent of the cases going to factfinding are resolved at that step. Moreover, there have been estimates that 60 to 70 percent of the cases going to factfinding are reported as being settled on the basis of the factfinder's recommendations.[9]

These estimates are subject to some question since there is considerable mediation mixed with the factfinding process. New York and New Jersey both report that between 25 and 30 percent of all cases going to factfinding are resolved with the use of mediation.[10] The New York experience is that nearly 80 percent of the factfinders mediate.[11] In addition, it has been found in New York that factfinders' recommendations were more often accepted by the parties where the neutral used mediation as part of the process.[12]

THE LIMITATIONS OF MEDIATION AND FACTFINDING

Despite what, on balance, appears to be a good record, reservations have been expressed toward mediation and factfinding in public sector disputes. One of the most frequently expressed concerns is that the parties may become too dependent upon these procedures and that real bargaining will be inhibited. With regard to factfinding, one experienced public sector neutral states that it offers the risk of "perpetually extending procedures . . . so that good faith bargaining occurs (only) at the last stages, if at all."[13] A similar reservation has been expressed by McKelvey who states that "factfinding may become, as it has under the Railway Labor Act, an

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9 Arvid Anderson, "Factfinding in Public Employee Disputes Settlement," in *Arbitration and Social Change,* Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, Washington, D.C.: Bureau of National Affairs, Inc. (1969) 112. For current figures on cases settled in New York factfinding, see Yaffe and Goldblatt, *Factfinding in Public Employment,* p. 46; Helsby, "Public Sector Disputes," p. 16; James Stern, "The Wisconsin Public Employee Factfinding Procedure," *Industrial and Labor Relations Review,* 20:1 (October 1966) 10-12.

10 Aronin, "New Jersey Experience," p. 46; Helsby, "Public Sector Disputes," p. 16; Yaffe and Goldblatt, *Factfinding in Public Employment,* pp. 17-18.

11 Yaffe and Goldblatt, *Factfinding in Public Employment,* p. 33.

12 Ibid., p. 41.

13 Arnold Zack, "Improving Mediation and Factfinding in the Public Sector," *Labor Law Journal,* 21:5 (1970) p. 273.

addictive habit, the first and not the final step in collective negotiations."[14]

There are other reservations that have been raised regarding present dispute settlement procedures. Our focus in this paper is upon only one of these limitations, i.e., the lack of finality. Although it now appears that most public sector disputes will be settled either by direct negotiation and/or the use of mediation and factfinding, there remains the problem of those impasses that cannot be solved with present procedures.

One method of strengthening the factfinding process is to provide a show cause hearing if the recommendations by the neutral(s) are rejected by one or both parties. Under this procedure the party rejecting the recommendations has the burden of justifying his rejection. Under New York State law, the legislative body (City Council, School Board, etc.) conducts such hearings and makes a determination. The obvious criticism of this procedure is that the legislative body may not be impartial and that the employee organization involved may therefore have little confidence in the procedure. A show cause procedure before a neutral panel or in the courts may have more appeal in terms of effective finality.

Another possibility beyond mediation and factfinding is the use of voluntary binding arbitration. At least eight state statutes now authorize the use of this procedure.[15] Whatever the merits of voluntary arbitration, its utilization depends on mutual agreement by the parties and therefore does not necessarily assure finality to the negotiation and impasse process.

Assuming that the strike is not available as a legitimate weapon, how can these disputes be resolved in a manner that will not discourage real negotiations and will result in a settlement based on the positions of the parties and the public interest? The alternative that will be explored here is a "final selection" procedure.

FINALITY AND COMPULSORY ARBITRATION

Probably the most obvious solution to the problem of finality is the use of compulsory binding arbitration in which one of the parties or an independent agency can invoke an arbitration procedure culminating in a decision that is legally binding upon the parties. Indeed, particularly in police and fire disputes, the use of this procedure is growing. As of August, 1971, nine states provided for compulsory binding arbitration of certain interest disputes.[16] Despite this growth, compulsory binding arbitration is still the target of strong attack. Among the criticisms of this procedure are

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[14] McKelvey, "Factfinding in Public Employment Disputes: Promise or Illusion," *Industrial and Labor Relations Review*, 22:4 (July 1969) p. 543.

[15] Hawaii, Maine, Massachusetts, Minnesota, Nevada, Pennsylvania, Rhode Island and Vermont.

[16] Louisiana, Maine, Michigan, Nebraska, Pennsylvania, Rhode Island, South Dakota, Vermont and Wyoming.

that it subverts the bargaining process, that it constitutes an illegal delegation of governmental authority and that it is still no guarantee that strikes will not occur.[17] Legal challenges to compulsory arbitration have been made in Michigan, Pennsylvania, Rhode Island and Wyoming with the courts in each of these states upholding the legality of compulsory binding arbitration.[18]

The criticism that this procedure subverts the negotiation process rests primarily on the assumption that there is a strong tendency for a neutral in an interest dispute to "split the difference" between the parties. Knowing that this is a strong possibility, the parties, it is argued, will not be inclined to make any concessions in negotiations since the neutral will take those concessions as given and "split the difference" from that point. Therefore, the arbitration process discourages real bargaining between the parties.

It is perhaps still too early to make any firm judgement about the impact of compulsory binding arbitration on the negotiation process as well as on the incidence of strikes. However, one study concludes that "the preliminary assessment is favorable as far as the absence of strikes is concerned and not unfavorable with respect to collective bargaining."[19] Further experience with the use of this procedure will be needed before the answers to these criticisms are available.

FINAL SELECTION AND INTEREST DISPUTES

Interest in final selection dispute settlement procedures has gained considerable impetus as a result of a proposal for new legislation regulating negotiation impasses in the transportation industry. Based on the President's recommendations and as proposed by the Department of Labor in February of 1970, this "Emergency Public Interest Protection Act" includes, as one of several alternative impasse procedures, a binding decision by a neutral panel based on the final offer of one of the parties. No compromise by the panel is allowed, and they would select the offer that best meets criteria included in this proposed legislation.[20]

This type of procedure has quite naturally attracted considerable interest

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[17] Arvid Anderson, "Compulsory Arbitration Under State Statutes," *Proceedings of the New York University 22nd Annual Conference on Labor*, New York: Mathew Bender (1970) p. 259.

[18] Dearborn Firefighter Union v. City of Dearborn, Civil Action No. 171-115, Michigan Court of Appeals (1971). Harney v. Russo, 71LRRM2817. City of Washington v. Police Department of the City of Washington, 72LRRM2847. City of Warwick v. Warwick Regular Firemen's Association, Rhode Island, 71LRRM3192.

[19] Joseph Loewenberg, "Compulsory Binding Arbitration in the Public Sector," a paper for the International Symposium on Public Employment Labor Relations, New York (May 4, 1971).

[20] *Daily Labor Report*, Washington, D.C.: Bureau of National Affairs, Inc. (February 27, 1970) F-1 to F-6.

in the public sector. With the strike outlawed in most jurisdictions, final selection, or "either/or" arbitration as some refer to it, represents an interesting possible alternative solution to the finality issue. One of the most thoughtful discussions of this alternative has been developed by Professor Carl Stevens.[21] Stevens addresses himself to the often-expressed view that compulsory binding arbitration subverts effective collective bargaining. Recognizing that the ability of the parties to impose costs of disagreement upon each other (usually through the strike), is a real stimulant to genuine negotiation, Stevens suggests that a binding arbitration process may serve a "strike-like" function.[22] Essentially his position is that the threat to arbitrate may serve as a substitute for the threat of a strike, although the settlements eventually reached may not be the same. In his words, "it seems quite possible that a threat to arbitrate, much like a threat to strike, might invoke the negotiatory process of concession and compromise which are characteristic of normal collective bargaining."[23] Stevens' model assumes: (a) that the strike is not available to the parties, (b) either party can invoke arbitration and (c) the arbitration decision will be on a final selection, "either/or" basis. This process would meet the objection that "compromise arbitration" reduces the chance of a negotiated settlement.

Others have suggested that a final selection procedure may be worth exploring as a dispute settlement technique in the public sector. Sabghir, in his discussion of the New York State law, has suggested non-binding final selection as part of a procedural alternative to provide more finality in dispute settlement.[24] Lev has suggested binding final selection as part of his proposal to have federal legislation enacted guaranteeing collective bargaining rights to most public employees.[25] Word has stated that "despite the customary criticisms surrounding its use in settling negotiation impasses, compulsory arbitration (requiring the arbitrator to use the one-or-the-other principle in issuing his award) seems to be a relatively attractive alternative."[26] A recent conference on the arbitration of police and firefighter disputes was also marked by considerable discussion of the final selection alternative.[27]

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21 Carl M. Stevens, "Is Compulsory Arbitration Compatible With Collective Bargaining?" *Industrial Relations* 5:2 (1966) p. 38-52.

22 Ibid., p. 41.

23 Ibid., p. 42.

24 Irving H. Sabghir, "The Taylor Act: A Brief Look After Three Years," *1970 Supplement to Report of Task Force on State and Local Government Labor Relations,* Public Personnel Association, Chicago (1971) p. 33.

25 Edward R. Lev, "Strikes by Government Employees: Problem and Solution," *American Bar Association Journal,* 57:8 (1971) p. 775.

26 William R. Word, "Impasse Resolution in the Public Sector," *GERR,* No. 337 (November 30, 1971) p. E-5.

27 *Arbitration of Police and Firefighter Disputes, Proceedings of a Conference on*

THE CASE FOR FINAL SELECTION

Assuming that in most jurisdictions the strike will continue to be considered illegal, and that an alternative is needed providing finality to the negotiation process and a measure of public interest protection, the final selection technique merits further analysis. Although it has not been put to any significant test as yet, there has been considerable argument that this procedure can provide the kind of uncertainty that will motivate the parties to negotiate in good faith. It is argued that, faced with the possibility of having a neutral decide in favor of the position of the other party, both parties have a strong incentive to modify their positions and to narrow their differences prior to arbitration. It is further argued that there may indeed be an added incentive to settle voluntarily. In short, it is claimed that this procedure will not negatively affect the negotiation process and, in addition to providing finality, may actually enhance the process of compromise and bilateral agreement in negotiations which otherwise might result in deadlock.

Moreover, it may be argued that if criteria are provided by statute for the neutral's use in making his decision, his choice can reflect the position of the party that more closely meets these criteria (for example, cost of living changes, comparable wages, employer financial position, etc.). In this manner the neutral's decision can be based on more than what might otherwise appear to be a "coin-flip" between two different final offers.

The perceptions of the parties toward such a dispute settlement may be crucial to its success. Those supporting the procedure hold that final selection will be more attractive to a labor organization than many of the present impasse systems which do not assure them of a binding neutral decision in the event of impasse. For the employer this may be a means of averting strikes that have occurred in the past even though they were illegal. It may be an effective *quid pro quo* for the employee organization to forego the use of economic pressure tactics. In addition, it may force both the employer and employee organizations to formulate more reasonable positions in negotiations, directed at criteria for settlement as provided by law.

THE LIMITATIONS OF FINAL SELECTION

One of the objections to final selection arbitration in the public sector is that it would be an unlawful delegation to a third party of government authority and responsibility. The same challenge has been previously referred to with regard to binding arbitration in general. It might be argued

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Arbitration of New Contract Terms for the Protective Services, American Arbitration Association, New York (March 9, 1971). See addresses by Winston L. Livingston and Theodore Sacks.

that a final selection process would rest upon even weaker legal ground than "normal" binding arbitration if there were not criteria or standards included for decisions by neutrals. The appearance of a "crap-shooting" process affecting both public resource allocation and the taxpayer's pocketbook may not be very attractive, particularly to legislators.

Further, it can be claimed that under a final selection procedure the neutral(s) may be faced with a choice between two extreme proposals, neither of which is justified nor workable in the mind of the arbitrator. Only the parties themselves can make this procedure work and the neutral(s) may be placed in an untenable position if the parties take extreme positions and do not really negotiate. As one writer has expressed it, "if the arbitrator were to agree wholly with the union's position, the employer may be unwilling to accept the award; or the legislative body may refuse to implement the award; or if the arbitrator were to agree with the public employer, he may find that the union would be unwilling to persuade its members to accept the award or to abide by the determination."[28]

Another reservation expressed regarding final selection is that it will only work, if at all, where the parties are mature negotiators and have the full support of their constituents. How, for example, does a union negotiator gain member support for a final position to be presented to a neutral? The political danger of going to a win/lose contest may be more than either party can accept. In negotiated settlements there is often no clear winner or loser. Final selection may offer the "loser" no "face-saving" avenue of escape.

Additional questions may be raised concerning the criteria for making final selection awards. If such standards are too limited and narrow, the uncertainty element that hopefully motivates negotiation may be lost. If the standards are too general, the neutral may be set adrift with little to guide him, and the parties may have no yardstick as to what may be a reasonable position. Further, the possibility of legal challenges to awards may be great if standards are not carefully prescribed.

The authority and responsibility for funding awards also poses problems. The neutral must surely consider financial ability of the employer in making his decision. And it may be true that, as Rhemus and Smith have put it, ". . . compulsory arbitration of economic issues is not a viable dispute settlement mechanism unless the legislature simultaneously undertakes a responsibility for funding or at least enables local authorities to fund the costs of awards which, by ordinary standards, are justified."[29]

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28 Arvid Anderson, "Compulsory Arbitration in Public Sector Dispute Settlement," an address to the Industrial Relations Research Association, New York Chapter (April 22, 1971) p. 14.

29 Charles M. Rhemus and Russel A. Smith, "Labor Relations in State and Local

One final comment may be appropriate regarding the limitations of final selection. The process, however effective it might turn out to be, has the appearance of game playing and may create the impression that it is not a rational decision-making process and is therefore politically unacceptable to policy makers. It may lack the acceptability that "compromise" procedures can generate.

A MUNICIPAL APPLICATION

While actual experience with a final selection system is not available at this time, it may be useful to inspect the procedure adopted by one municipality that provides for such an arbitration system.

In September, 1971, the Common Council of the City of Eugene, Oregon adopted an ordinance setting procedures for collective bargaining including, as a final impasse step, a final offer selection system.[30] The ordinance authorizes, in addition to the final selection procedure, the use of mediation and factfinding prior to arbitration. Several features of this ordinance are worth noting.

a. It is tied to negotiation time limits related to budget deadlines.

b. Both parties are compelled to utilize this procedure when other procedures have not produced agreement.

c. The final selection procedure may be applied to any legitimate negotiable issue.

d. It may involve a limited number of unresolved issues or all contract items if there has been no agreement on any issues.

e. The parties each submit one final offer and may submit an alternative offer.

f. They may negotiate these offers prior to a final offer selection decision.

g. A tripartite final selection panel is utilized.

h. The panel is restricted to making a final selection. It may not mediate, factfind, compromise, etc.

i. In addition to hearing the parties' arguments, the panel may generate any additional information it feels is pertinent to its decision.

j. The panel's final decision must be based upon criteria provided in the ordinance and that decision and any previously agreed upon items become the contract between the parties.

CONCLUSIONS

The expanding use of compulsory arbitration in public employment negotiation impasses gives testimony to the search for finality. While most negotiations result in settlement either by negotiation or through utiliza-

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Government in Michigan," *1970 Supplement to Report of Task Force on State and Government Labor Relations,* Public Personnel Association, Chicago, Illinois (1971), p. 29.

[30] *An Ordinance Pertaining to Collective Bargaining Procedures and Processes for Recognition, Negotiations, and Settlement of Disputes; Implementing the Charter Amendment adopted May 26, 1970; Amendment Section 2.875 of the Eugene Code, 1971. Adding a New Section 2.876 to the Eugene Code, 1971; and Declaring An Emergency.*

tion of mediation, factfinding, voluntary arbitration, etc., there remains the problem of handling situations where these procedures fail. The tests of any such procedure must include its effect on the negotiation process, the attitudes of the parties toward the process and the settlement results. Compulsory arbitration has yet to have an extensive test. The possibility that it may adversely affect the parties' willingness to negotiate remains, although this has not been shown to be a fact. In theory, at least, a final selection procedure could overcome this possible limitation of a "traditional" compulsory arbitration system.

Final selection need not be a completely "either/or" decision system. As suggested by some advocates, it implies an acceptance of the total package of one party or the other. It is possible that such a system could be based on an "either/or" decision by the neutral on each individual issue presented to him. These decisions could be made on the basis of the relationship of the final positions of the parties to statutory criteria. This would meet the objection that final selection is a "crap-shooting" system but might lead to compromising by the neutral(s) that would have an adverse effect on the negotiation process. Final selection on each individual issue, however, might strengthen the neutral's hand in relating to the criteria that he is obliged to follow under a statute.

On balance, it would appear that final selection, as an alternative dispute settlement technique, merits further consideration and experimentation in public sector impasses not settled by other procedures. Like many other procedures, it offers no magic solution to resolving impasses, but it may be a most useful addition to providing finality without impairing the bargaining process.

Representation and Bargaining Unit Issues

Morris Slavney, *Chairman*
Wisconsin Employment Relations Commission
Madison, Wisconsin

The determination of representation and bargaining unit issues in public employee-employer collective bargaining requires the consideration of the following essential factors:

1. The form of recognition granted to the Union.
2. The identity of the employees entitled to the rights and privileges involved.
3. The scope of the unit which will best effectuate the principle of collective bargaining.
4. Procedures to establish the representative status.
5. Procedures to maintain stability of the collective bargaining relationship and at the same time guarantee the rights of the employees involved.

My discussion of these factors is based primarily upon a review of (1) the March 1970 report of the Advisory Commission on Intergovernmental Relations, issued following a year-long study of employee-employer relations in the public sector; (2) the Twentieth Century Fund Task Force Report entitled "Pickets at City Hall," issued in February, 1970;[1] (3) various state public employment bargaining statutes, including those in Wisconsin; and (4) the experience of the Wisconsin Employment Relations Commission in administering our separate municipal and state employment collective bargaining acts, effective February, 1962, and January, 1967, respectively.

THE FORM OF RECOGNITION

Should the form of recognition be "formal" or "informal"? Should it be "exclusive," or should all employee organizations be given some form of recognition? The Advisory Commission on Intergovernmental Relations, referred to hereinafter as the Advisory Commission, states as follows:

> State public labor-management relations statutes should require public employers to accord . . . formal recognition . . . to the organization representing a majority of the employees in an appropriate unit. The Commission believes that this preferred treatment accorded the majority representative should condition the approach to minority groups, and that extension of in-

[1] A privately endowed organization, whose experts consisted of practitioners in both the public and private labor-management sectors.

formal recognition privileges to such organizations should not be required by state public labor-management relations laws.

Legislators have basically two options regarding minority groups which are compatible with this position. Management could be statutorily barred from extending any informal recognition privileges to such organizations, and this would have the effect of giving exclusive recognition rights to the majority organization. It also would conserve management's time and eliminate its tough task of keeping informal consultations from becoming de facto negotiations, especially on such non-economic issues as the agency's 'mission.' On the other hand, public employers could be authorized to extend, at their own discretion, informal recognition to minority organizations for the purpose of submitting proposals. This variation of the two-level approach meets the varying needs of the individual public employer and the varying strengths of employee organizations.

The Twentieth Century Fund Task Force Report, referred to hereinafter as the Task Force Report, contains the following statement:

> Representation works best if it is exclusive after attracting a majority as its adherents. The principle is fully established in our political life. The elected representative is the exclusive representative of the constituency. Where proportional representation has been attempted in labor relations, it has not been successful. As a practical matter, when both a majority and a minority union are given representation rights in the same work unit the competition between them may have a distinctly unsettling effect on employee relations. Once a union has proven it has the support of a majority in the unit to be represented, it should be the only organization permitted to represent employees until such time as a majority elects to change its affiliation.

States having public employee collective bargaining statutes, wherein exclusive recognition is granted to the majority organization, are indicated below. Also indicated are the type of employees covered by the various statutes.

State	*Statutory Coverage*
Connecticut	Local
	Teachers
Delaware	State and local
Hawaii	All public employees
Maine	Local, including teachers
Maryland	Teachers
Massachusetts	Local, including teachers
Michigan	Local, including teachers
Missouri	State and local, excluding teachers, police and state police
Nebraska	State and local
Nevada	Local, including teachers
New Hampshire	State

New Jersey	State and local, including teachers
New York	State and local
North Dakota	Teachers
Oregon	State and local
	Teachers
Pennsylvania	Local and state
	Police and fire
	Municipal transit
Rhode Island	Local
	Teachers
	Firefighters
	Police
Vermont	Local, excluding professionals
	State
	Teachers
Washington	Local
	Teachers
Wisconsin	Local
	State

Minnesota has two laws, one governing state and local employees and the other teachers. The Minnesota statute requires the granting of formal recognition to the majority organization while informal recognition is granted to the minority organizations which represent state and local employees. Under the teacher bargaining law, recognition is granted to a single organization; however, when there is more than one organization there is proportional representation on a teachers council, based on membership. South Dakota's statute covers state and local employees including teachers, and the law also grants formal recognition to the majority organization for members only, while informal recognition is granted to the minority organizations, if any. With respect to the meet and confer laws of Minnesota and South Dakota, the Advisory Commission stated:

> Formal recognition is given to an employee organization chosen by the majority of employees in a unit. In its dealings with management, this organization speaks for all members of the unit, and any agreement that is reached applies to these employees. Other organizations continue to receive informal recognition and may present their views to management, but only one voice may speak for all employees in a unit.
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> Supporters of the two-level (informal-formal) recognition approach argue that the willingness of public employers to listen to the views of any public employee, union or association is a necessary and distinctive trait of the meet and confer system. This openness gives individuals, minority organizations, supervisory groups, as well as the majority representative a chance to have their voices heard. If an employer adopts rules for majority representation,

then certain minority organization rights should also be recognized. Refusal to recognize an employee organization on the basis that it failed to represent a majority of those in a unit would impair the fundamental right of employees to form, join and participate in unions or associations of their own choice and to be represented by such organizations in dealings with the public employer. Balancing the interests of the majority representative and minority groups is achieved through the informal recognition technique. Management, from a practical point of view, clearly cannot meet and confer with a mass of small organizations. Formal recognition circumvents this problem. Informal recognition, on the other hand, protects minority organization rights and serves as a check on the potentially arbitrary views of the majority representative.

As noted above, it is indicated that Wisconsin grants exclusive recognition to the majority organization under both municipal and state bargaining laws. Under the state employee bargaining law, the exclusivity of the recognition is specifically set forth in the statute.[2] While it is interesting to note that we have no such specific reference in the municipal statute to the exclusive status of the majority representative, our Commission administratively has held that the majority representative is the exclusive collective bargaining representative of all the employees in the appropriate unit, and such decision has been affirmed by our Supreme Court.[3]

The fact that a majority representative has been certified as the exclusive bargaining representative, or recognized as such, in those states where there is exclusive representation, does not mean that the minority organizations quietly fold their tents and fade away. On the contrary, in public employment, unlike private employment, an organization may communicate with the public employer, and, where there exists a strong minority organization, that organization makes its position known through active lobbying efforts, appearances at public hearings and in statements to the news media, usually to the effect that the majority organization has not asked for enough and that the employer is not giving enough.

Our experience in Wisconsin convinces me to recommend exclusive recognition, despite the fact that such a concept may result in the possible extinction of some minority unions. However, the right of employees to form, join or assist labor organizations, their right to be represented by such organizations in collective bargaining and the right to bargain collectively with their employers are included in a collective bargaining statute, whether relating to public or private employment, not primarily to guaranteee immortality for any union, but rather to promote stable collective bargaining in accordance with the free choice of the majority of the employees involved.

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2 Section 111.83, Wisconsin Statutes.

3 *Milwaukee Board of School Directors* (6883-A), 3/66 (Aff'd. 42 Wis. 2nd 637).

THE IDENTITY OF EMPLOYEE RIGHTS AND PRIVILEGES

In establishing appropriate collective bargaining units, one of the most perplexing problems has been to determine what employees are entitled to representation and how they are to be included in collective bargaining units. Primarily, the problem exists in the area of supervisory employees, and the issue arises as to whether supervisory employees should have any right to representation and, if so, should they be included in units with rank and file employees, or should they have their own supervisory units? Should they be placed in separate units, the question then arises as to whether supervisors should be represented by unions which also represent rank and file employees or should supervisors be represented by organizations which admit to membership only supervisors (similar to the procedures established in the National Labor Relations Act granting collective bargaining rights to guards).

Public employee unionism has existed for a long time prior to the adoption of public employee bargaining laws, and historically supervisory personnel have been members of public employee unions. This is especially true in the uniformed services and in education.

The Advisory Commission's report, with respect to the exclusion of supervisory and certain other personnel of the public employer, contains the following statement:

> The Commission recommends that in order to protect the position of public employers, employee rights and privileges conferred by state public labor relations laws should be denied to: (a) managerial and supervisory personnel who have authority to act or recommend action in the interest of the employer in such matters as hiring, transferring, suspending, laying-off, recalling, promoting, discharging, assigning, rewarding or disciplining other employees; who have authority to assign; and/or who direct work or who adjust grievances; (b) elected and top management appointive officials; and (c) certain categories of 'confidential' employees including those who have responsibility for administering the public labor relations law as a part of their official duties.
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> The sensitive question of the status of supervisory and other key personnel in public employee organizations must be dealt with forthrightly in State public labor-management relations legislation. The Commission believes that while such statutes should not prohibit supervisors and managerial personnel from membership in a union or association, they should not be allowed to hold office in or to be represented by an employee organization to which rank-and-file employees belong. Elected officials, key appointive people and certain 'confidential' employees also should not be accorded these employee rights. Participation of any of these personnel in union or associational activities would sharply limit management's effectiveness at the discussion table.
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> Some observers contend that states should statutorily accord to supervisory

employees the rights to organize and to present proposals to the employer's representative. It is generally conceded, however, that this approach is sound only if supervisors, when exercising such rights, act through an organization entirely independent of any which represents non-supervisory employees. Michigan's Public Employment Relations Act for city, county and district employees, for example, permits supervisors to form their own bargaining units. Establishment of separate units presumably ensures that supervisors will continue to uphold their responsibilities as representatives of management when dealing with rank-and-file employees.

Another body of opinion holds that no state law can deal comprehensively with the status of all supervisors, given the diversity of public employers and their varying supervisory structure. It is difficult, if not impossible, so the argument runs, to deal equitably with this problem by statutory definition. This position is taken in New York State's 'Taylor Law,' which does not attempt to define 'supervisory employee' precisely, but empowers the state public employee relations unit to promulgate this definition by rule or decide it on a case-by-case basis and then apply it to such occupational categories as the agency deems appropriate.

The Commission finds both of these approaches defective. Allowing supervisors to organize and to present proposals perpetuates the vocational ambivalence that this group has long exhibited. The need at the present time is for management to identify its members and to develop a healthy community of interest. This, in the long run, will benefit employees more than any short-term gains which might come from supervisors continuing to act as part-time advocates for the rank-and-file.

Leaving the supervisory status question open for administrative determination will produce widely varying interpretations of organizational rights, and this will do little to engender cohesion within management ranks. Consistency between and among state and local jurisdictions in the definition of the rights of supervisory and managerial personnel can only be realized through legislative action. Experience to date indicates that administrative units have encountered severe difficulties in coping with this question when legislative guidelines are conflicting, uncertain or nonexistent.

The Commission believes, however, that supervisory and managerial personnel should enjoy certain basic organizational rights. They should be permitted to join and to be represented by an organization that does not include rank-and-file employees on its membership roster. They or their representatives should be authorized to meet on an informal basis with their employer's agent for the purpose of consultation in connection with the terms and conditions of employment or on such other matters as may be determined by the agency head. Yet, regardless of their top or middle echelon status, because they are still members of the management team, supervisors or their representatives should not participate in formal discussions, nor should they be parties to memoranda of understanding with the employer.

The Task Force Report deals with the problem in the following fashion:

Another question that often arises in the union's quest for recognition is what categories of employees it may represent in the hierarchy of employment. It is established labor relations practice, . . . that employees and their supervisors should not be in the same labor organization. The difficulties

that can arise are obvious if they are both in the same union when, for example, a grievance is presented involving some supervisory action.

A review of the existing public employment legislation on the state level indicates a smorgasbord of approaches with regard to supervisors. Some of the statutes make no reference to the term "supervisor" or its equivalent, and further contain no specific direction as to whether supervisors should or should not be included in any unit or in units with rank-and-file employees. The absence of such language does not necessarily mean that supervisors are to be given rights granted to other employees or are necessarily excluded from any collective bargaining unit. It may very well be that the agencies administering said statute may, by rules and decisions, make determinations in that regard.

The Connecticut statute governing local public employees, in its definition of the term "employee," specifically excludes supervisors. In determining the supervisory status of the individual involved, the Connecticut Board must consider, *among other criteria,*[4] the following:

> . . . whether the principal functions of the position are characterized by not fewer than two of the following: (a) performing such management control duties as scheduling, assigning, overseeing and reviewing the work of subordinate employees; (b) performing such duties as are distinct and dissimilar from those performed by the employees supervised; (c) exercising judgment in adjusting grievances, applying other established personnel policies and procedures and in enforcing the provisions of a collective bargaining agreement; and (d) establishing or participating in the establishment of performance standards for subordinate employees and taking corrective measures to implement those standards. The above criteria for supervisory positions shall not necessarily apply to police or fire departments.

The Connecticut teacher statute establishes two units, (1) an "administrators unit," consisting of certified teachers in a school district employed in positions requiring intermediate or supervisors certificate or an equivalent thereof, and a separate unit is mandated for certified teachers not in the former unit. However, superintendents, assistant superintendents and those certified personnel acting as negotiators for the school district are exempt from the coverage of the statute.

In Delaware the law covering all public employees, except teachers, excludes elected officials and appointees of the Governor from the term "employee." There is no reference to the term "supervisor," or its equivalent. On the other hand, the Delaware teacher collective bargaining statute specifically excludes supervisory personnel from its coverage.

The Hawaii Act, effective July 1, 1970, defines the term "supervisory" as follows:

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[4] Not specifically enumerated.

> . . . any individual having authority in the interest of the employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The term "employee" in the Hawaii Act only excludes elected and appointed officials and the administrative officer, director, or chief of a state or county department or agency or any other top-level managerial and administrative personnel. The latter exemption, no doubt, will cause some problems for the Hawaiian Board. Significantly, supervisors can only be in units of supervisory employees, and the statute establishes two types of supervisory units, one in blue collar employment and the other in white collar employment.

The Maine Act governs all public employees, except those employed by the state, excludes elected officials, appointed officers, and department or division heads for unspecified terms, school superintendents and assistant superintendents from the term "employee," and such positions are excluded from any bargaining unit. However, the state labor commissioner is granted the discretion to determine whether supervisory positions should be excluded from the coverage of the Act, and the Act sets forth established criteria, among others, which must be considered. However, the Maine Act prohibits the exclusion of principals, assistant principals or other supervisory employees from school system bargaining units which include teachers; it also prohibits excluding supervisory personnel in units of nurses.

The Massachusetts state employee law excludes department heads and appointees of the governor and "any other persons whose participation or activity in the management of the employee organization would be incompatible with law or with an official duty as an employee." There is no provision in this statute referring to supervisors in units. The Massachusetts local employee law does not specify "supervisors" as one of the exceptions to the definition of the term "employee." As a matter of fact, no reference is made to supervisors in the statute.

Minnesota's general public employee law, which does not cover teachers, requires the state labor conciliator, in establishing units, to consider among other factors, the "supervisory level of authority." The Minnesota teachers statute excludes only school superintendents from its coverage.

The Nevada statute provides as follows:

> A local government department head shall not be a member of the same negotiating unit as the employees who serve under his direction. A principal, assistant principal or other school administrator below the rank of superintendent, associate superintendent or assistant superintendent shall not be a

member of the same negotiating unit with public school teachers unless the school district employs fewer than five principals but may join with other officials of the same specified ranks to negotiate as a separate negotiating unit.

The definition of the term "employee" in the New Jersey statute excludes "elected officials, heads, and deputy heads of departments and agencies, and members of boards and commissions, provided that in any school district this shall exclude only the superintendent of schools or other chief administrator of the district" from the term "employee."

The Oregon law pertaining to employees other than teachers and nurses makes no reference to supervisors. Its teacher law only exempts superintendents from coverage and permits administrators, principals and directors to establish separate units.

The Pennsylvania statute, applicable to all employees except police, firefighters and municipal transit authorities, excludes "management level employees." It defines the term "supervisor" in the National Labor Relations Act's tradition. It provides that first-level supervisors cannot be included in units with rank-and-file employees. The Pennsylvania police and firefighters compulsory arbitration statutes contain no reference to supervisory personnel or to their inclusion or exclusion from units.

The Rhode Island state employee law specifically excludes supervisors from coverage. The teacher law excludes the superintendent, assistant superintendent, principals and assistant principals. The police and firefighters statute apparently includes the chiefs of police and the fire chief.

The Maryland teacher bargaining law includes all certified teaching personnel in teacher units, except the superintendent of schools. The Michigan public employee law, by reference to its private labor mediation act, excludes persons holding an executive or supervisory position from any unit. The New Hampshire statute has no reference to supervisors or their inclusion or exclusion from units. The New York Act, which is a comprehensive statute, makes no exclusion of supervisors from the definition of the term "employee." The North Dakota bargaining law permits school administrators to be included in separate units of administrators.

If any of you has read the Wisconsin municipal employment bargaining statute, you will immediately recognize that it is quite a nebulous law in many respects, including the fact that it only defines three terms in the statute, namely, municipal employer, municipal employee and the Wisconsin Employment Relations Commission. A municipal employee is defined as "any employee of a municipal employer except city and village policemen, sheriff's deputies and county traffic officers." While not protected in their organizational activities, law enforcement personnel are granted certain procedural rights with respect to the establishment of their representative status.

In one of the early decisions rendered by the Commission we were faced with the issue of whether supervisors were covered by the statute, and whether they could be included in units of rank-and-file personnel or in their own units. The Commission determined that true supervisory personnel, since they were the agents of the municipal employer, would not be considered employees under the statute. The Commission felt, and continues to feel, that if collective bargaining is going to continue in public employment, there must be an identifiable employer-employee relationship. Who is the municipal employer? There is no doubt that the taxpayers and residents of the community are the "stockholders" in the municipal corporation. Is the mayor the only representative of the stockholders? Can you imagine a large manufacturing concern having a substantial number of employees supervised by the president of the corporation? Is the mayor or the city manager the only supervisor to be excluded? He too is, in fact, an "employee" of the public employer.

The collective bargaining process doesn't end at the bargaining table. In order to maintain a viable collective bargaining relationship the collective bargaining process continues throughout the administration of the collective bargaining agreement. Collective bargaining is a conflict relationship. Management must have their agents available for the resolution of grievances, for the supervision and direction of the work force and for the evaluation of employee performance. It was with that concept in mind that the Wisconsin Commission excluded supervisors from the coverage of the municipal employer bargaining law. In determining an employee's supervisory status, we considered the following criteria:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees.
2. The authority to direct and assign the work force.
3. The number of employees supervised, and the number of other persons exercising greater, similar or lesser authority over the same employees.
4. The level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employees.
5. Whether the supervisor is primarily supervising an activity or is primarily supervising employees.
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees.
7. The amount of independent judgment and discretion exercised in the supervision of employees.

While we concluded that supervisors are not to be considered employees and thus not covered by the statute, we also determined that the mere membership of a supervisor in an employee organization did not taint that organization; however, we indicated that the supervisor could not actively participate in the collective bargaining process or take any active role in

determining collective bargaining policies of the organization. Public employee unionism had its origin in Wisconsin in the middle 1930's, and, as a result, when the municipal law became effective in 1961, many supervisors who had worked themselves up through the rank of employment may have been very active in their organizations, which prior to the law, were most actively engaged in lobbying activities before city councils, county boards, school districts and other municipal bodies. The Commission, therefore, felt that it would not disenfranchise supervisory personnel from their long membership in employee organizations. However, many officers of various public employee unions, because of their supervisory status, had to resign their office in the local union; this applied to chiefs of police, fire chiefs and subordinate officers in the fire departments. Many principals held active office in teacher associations. As a matter of fact, during the first two years of the statute, the presidents of the Wisconsin Education Association were holding superintendent positions in school boards. Throughout the state, and I am sure this is true in other states, principals had been active in local affiliates of teacher associations, and in Wisconsin, prior to the advent of our public employee bargaining statute, the materials normally handed out by a principal to a newly-hired teacher at the commencement of the new school year usually included an application for membership in the teacher association. One of our first prohibited practice cases in the municipal law involved such activity, which we found to be a violation of the law.

Our state employment bargaining law specifically excludes supervisory personnel from the coverage of the law and sets forth criteria for determining who are supervisors. Such criteria are similar to the tests applied by our Commission in determining supervisory status under our municipal law. However, the state law permits membership in the employee organization by supervisors.

Just another word about supervisors. There are many employee classifications in public employment having the term supervisor attached to the job title. Such designation does not necessarily make the employee involved a supervisor, and this has caused some consternation among both the employer and the employees involved, for many of the employees occupying such classifications would prefer to be considered as supervisors for salary purposes and not be so considered in terms of working conditions.

SCOPE OF UNIT

In order to determine the collective bargaining representative and to carry out the policies of collective bargaining, there must be established a unit of employees, first to determine who is eligible to vote, and secondly to determine the coverage of the collective bargaining agreement.

The Advisory Committee's report contains no recommendations with respect to the scope of the unit but does refer to appropriate units. The Task Force Report contains the following statement on that subject:

> In the steps leading to union recognition, it must be determined precisely what the unit of employees is in which the union may ultimately act as employees' representative. Under the federal statute, the NLRB decides on the 'appropriate unit' in private industry if it is in dispute, as it frequently is. The union involved will most likely want a unit in which, by extension or contraction, it believes it can muster the largest proportionate number of its supporters. The employer, for operational reasons or to pare the union's strength, may want a different unit demarcation. Some adjudication of the unit question is required.
>
> The Task Force believes in public employment the largest feasible unit for recognition, consistent with viable negotiations, should be provided. Serious distortions in public services can occur if one agency or department negotiates cost items without regard to other agencies and departments under the same budgetary or taxing authority.

Connecticut, Maine and Massachusetts statutes have similar provisions with regard to the determination of the unit. The Connecticut statute contains the following:

> (3) The board shall decide in each case whether, in order to insure to employees the fullest freedom in exercising the rights guaranteed by the act and in order to insure a clear and identifiable community of interest among employees concerned, the unit appropriate for purposes of collective bargaining shall be the municipal employer unit or any other unit thereof, provided there shall be a single unit for each fire department consisting of the uniformed and investigatory employees of each such fire department and a single unit for each police department consisting of the uniformed and investigatory employees of each such police department and no unit shall include both professional and nonprofessional employees unless a majority of such professional employees vote for inclusion in such unit, provided employees who are members of a profession may be included in a unit which includes nonprofessional employees if an employee organization has been designated by the board or has been recognized by the municipal employer as the exclusive representative of such unit and a majority of the employees in such profession vote for inclusion in such unit, in which event all of the employees in such profession shall be included in such unit.

The Delaware general public employee law sets forth that, in determining the bargaining unit, the agency administering it is required to consider the "duties, skills and working conditions of the public employees; the history of collective bargaining by the public employees and their bargaining representatives; the extent of organization among the employees; and the desire of the public employees." Parenthetically, if we had such a provision in our state, we would have problems under this type of a requirement.

Hawaii has met the problems of unit head on, and the statute has established 13 possible units as follows:

> Sec. 6. Appropriate bargaining units. (a) All employees throughout the state within any of the following categories shall constitute an appropriate bargaining unit:
>
> 1. Nonsupervisory employees in blue collar positions;
> 2. Supervisory employees in blue collar positions;
> 3. Nonsupervisory employees in white collar positions;
> 4. Supervisory employees in white collar positions;
> 5. Teachers and other personnel of the department of education under the same salary schedule;
> 6. Educational officers and other personnel of the department of education under the same salary schedule;
> 7. Faculty of the University of Hawaii and the community college system;
> 8. Personnel of the University of Hawaii and the community college system, other than faculty;
> 9. Registered professional nurses;
> 10. Nonprofessional hospital and institutional workers;
> 11. Firemen;
> 12. Policemen; and
> 13. Professional and scientific employees, other than registered professional nurses.
>
> Because of the nature of work involved and the essentiality of certain occupations which require specialized training, units (9) through (13) are designated as optional appropriate bargaining units. Employees in any of these optional units may either vote for separate units or for inclusion in their respective units (1) through (4). If a majority of the employees in any optional unit desire to constitute a separate appropriate bargaining unit, supervisory employees may be included in the unit by mutual agreement among supervisory and nonsupervisory employees within the unit; if supervisory employees are excluded, the appropriate bargaining unit for such supervisory employees shall be (2) or (4), as the case may be.

Such a provision eases the task of the agency with respect to the determination of bargaining units. However, such mandatory units may very well deprive a substantial number of employees from exercising their rights to engage in concerted activity in collective bargaining, since it may very well be possible that no individual labor organization may be able to organize a majority of the employees in some of the statutory units, and thus, while a substantial number of employees in the particular unit would desire collective bargaining, they cannot exercise that right until the organization seeking the representative status has done a substantial bit of organizing. The units in Hawaii are, in fact, state-wide since there are no public employers in the state of Hawaii except the state and the university and its community college system. In other words, the school teachers are employed by the state. The Department of Public Works in Hawaii is employed by the state as are the police and fire departments of the various communities.

The Massachusetts state employee law provides as follows with respect to the establishment of appropriate units:

> (3) Employee organizations and the appropriate department or agency heads may, by mutual agreement, subject to the approval of the director of personnel and standardization, establish appropriate collective bargaining units based upon community of interest, which may include similar working conditions, common supervision and physical location. Employees may, in appropriate cases, be given the opportunity to determine for themselves whether they desire to establish themselves as an appropriate collective bargaining unit.

The Michigan law, again by reference to its private employment act, sets forth that the "unit shall be either all the employees of one employer employed at one plant or business enterprise or a plant unit or a subdivision of any of the foregoing units; provided, however, that if the group of the employees involved has been recognized by the employer as a unit for collective bargaining, the board may adopt such unit."

The Missouri public employee law which excludes policemen and teachers sets forth the appropriate unit to be "a unit of employees at any plant or installation or in a craft or in a function of a public body which establishes a clear and identifiable community of interest among the employees concerned."

New Hampshire's state employee law establishes the unit as:

> . . . all employees, or, in the alternative, groups of employees classified according to department, groups of departments, institution or groups of institutions, as the commission shall determine, upon petition, to be appropriate in order to assure to employees the fullest freedom in exercising their rights hereunder and also to provide for efficient and harmonious administration of management-employee relations. No unit may contain less than 10 employees; provided however, that with respect to the State University and Colleges, a unit for purposes of representation and collective bargaining shall not be less than entire campus of any one division of the system.

The New Jersey statute contains no guidelines for the establishment of bargaining units, but permits the agency to establish its own rules and policies with regard thereto.

The New York statute requires the Public Employment Relations Board to establish the appropriate unit taking into account that (a) the community of interest of the employees concerned, (b) the officials of government at the level of the unit shall have the power to agree, or to make effective recommendations to other administrative authority or the legislative body with respect to the terms and conditions of employment upon which the employees desire to negotiate and (c) the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public. If my memory is correct, there are some-

thing like five or six units established by PERB in state employment in New York.

In establishing the unit among public employees in Pennsylvania, the Pennsylvania Board may establish an overall unit or a subdivision of the employer in the unit, and, in determining the unit, that agency must take into consideration the community of interest and the effects of an overfragmentation. In addition, there can be no appropriate unit consisting of both professionals and nonprofessionals, unless a majority of the professionals vote for inclusion with the nonprofessionals. Prison and mental hospital guards and court employees are not permitted to be included with units of other employees. However, they may only be represented by organizations representing similar employees. The Pennsylvania Board must also take into consideration in state employment that bargaining will be on a state-wide basis and also whether local working conditions are involved. However, such provisions shall not be deemed to prohibit multi-unit bargaining. The Pennsylvania law also permits supervisors at the first level of supervision to form their own units.

The Vermont state employee law permits units to be "all the employees of the state or members of a department or agency or such other unit or units as the board may determine are appropriate to best represent the interests of employees."

Under the Wisconsin municipal employment law our agency has no discretion to establish an appropriate collective bargaining unit. Units are established in accordance with the procedures set forth in the private employment labor relations act, with some exceptions. Under the latter act the appropriate bargaining unit is described as all employees of the employer except where employees engaged in a separate plant, division, department or craft indicate a desire to establish themselves as a separate collective bargaining unit, the Commission must conduct a vote in the separate plant, division, department or craft among the employees involved, and if a majority of the eligible employees vote in favor of separation, they become a separate unit. Under the municipal bargaining law, the procedure is the same except for the fact that craft employees can only be in units of the same craft. The same principle applies to professional employees. The basis for separate craft units was the fact that the craft unions in Wisconsin indicated that they would not support the enactment of the municipal bargaining law unless they were guaranteed that craft employees would not be included in larger units of non-craft employees or along with other craft employees.

It must be obvious to you that such requirements with regard to the establishment of bargaining units have resulted in an overfragmentation of

bargaining units in municipal employment in Wisconsin. For example, the City of Milwaukee has over 20 separate bargaining units. In the City of Appleton, somewhere in the neighborhood of 60,000 population, both AFSCME and teamsters were engaged in organizational efforts among clerical employees in some six departments of the city hall. As a result of the statutory provision granting employees in each department an opportunity to establish separate units, the City of Appleton wound up with six units of stenographers and clericals in six departments. The teamsters represented three of the departmental units while AFSCME was certified as the representative in the remaining three departments. You can imagine the frustration of management in having to bargain with two unions, who are forever competing with each other, for the same classification of employees under the same civil service system.

There are at least two bills presently pending in the Wisconsin legislature to amend its municipal employment law, and both labor and public employment management have favored the elimination of the present procedure for the establishment of units and would favor granting discretion to our agency in the establishment of bargaining units. If we had such discretion, we would no doubt eliminate a majority of the fragmentation that now exists and would probably establish units on the basis of community of interest, such as white collar, blue collar employees and the like.

The state employment labor relations statute grants our agency discretion similar to that granted to the National Labor Relations Board by the Federal Act with respect to unit establishment. However, there is a factor in the state employment act which has affected our so-called discretion, and that is that the only mandatory subjects of collective bargaining are those matters which are in the discretionary authority of the department heads, and after four years of operation under the state act there has been no uniform policy adopted by the department heads. They continue to insist on operating their own individual kingdoms and making their own individual decisions with respect to those matters on which they have the authority to bargain. As a result, our agency, in establishing bargaining units, has not crossed departmental lines. An example of the frustration in this regard is the fact that in a petition filed by the Wisconsin Nurses Association requesting a unit of all the nurses in state employment, employed in six state departments, we found it necessary to establish six separate bargaining units of nurses, although they were covered by the same salary schedules and the same civil service provisions on a uniform basis. There is one consolation, however. The nurses are represented by one organization in all units, and there is nothing in the act which prevents multiunit bargaining. The fragmentation of bargaining units becomes an aggravation

when different labor organizations represent employees of similar classifications in separate units.

Also issues may arise concerning the scope of the unit with respect to whether the employee has a sufficient interest in his employment to be included in the unit, such as part-time employees, casual employees, seasonal employees and the source of funds utilized in the payment of employment services. Without going into detailed review of the various state enactments, it is sufficient to say that a number of statutes make no reference to these matters, and where you have a law administered by a full-time agency, such determinations are usually made by the agency. There are, however, some statutes which specifically include part-time and casual employees as well as seasonal employees. Where there exists a strong civil service system, non-civil service employees may be excluded from the term "employee." One of the issues that we have had to decide a number of times is whether an individual who is in the employ of a school board and who is paid from a source of funds from federal or state agencies, is an "employee." In those cases we have determined that, regardless of the source of funds, as long as the municipal employer has control and supervision over the employee, that employee is a municipal employee.

We have included regular part-time employees in units of full-time employees on the basis that the former have a substantial interest in their employer. Usually casual employees are not included in bargaining units since they have an insufficient interest in the terms and conditions of employment to warrant such inclusion.

Another area affecting the scope of the unit is the status of confidential employees. By "confidential employees," I mean those employees who are privy to management decisions and policies relating to the collective bargaining relationship. I am not talking about those employees who maintain confidential medical records and the like. We have found that in many employment situations there is a tendency for supervisors to have their own private secretaries, and to claim that the private secretary is a confidential employee. In many cases one or two of said secretaries may be privy to matters relating to collective bargaining, and they, of course, are excluded from the bargaining unit for obvious reasons. However, in some instances the confidential work may be spread among three or four clericals or stenographers in a particular office. It is obvious that all cannot be excluded because they only have bits and pieces relating to confidential matters. We have informed the municipal employer to delegate all such work to one of the secretaries, for to permit an employer to do otherwise could completely eliminate a bargaining unit of clericals in a particular office as a result of the distribution of the confidential work to all secretaries in the office.

PROCEDURES TO ESTABLISH REPRESENTATIVE STATUS AND PROCEDURES TO MAINTAIN STABILITY OF THE COLLECTIVE BARGAINING RELATIONSHIP AND STILL GUARANTEE THE RIGHTS OF THE EMPLOYEES INVOLVED

Many statutes permit voluntary recognition of the majority representative and provide, as well, for elections to determine the exclusive bargaining representative through a secret ballot election. The agency normally adopts rules of procedure with respect to filing of petitions, with respect to the conduct of hearings to determine issues, with respect to appropriate unit, with respect to eligibles and to work out some agreement as to the physical conduct of the vote. Usually formal certifications of the results of the election are issued by the agency and submitted to the parties.

The more sophisticated statutes permit the filing of election petitions, either to determine whether the employees desire to be represented or whether they desire to discontinue their representation by a particular labor organization. Many statutes prohibit the conducting of a second election within a period of 12 months from the first election, and some of the statutes specifically set forth the time period in which petitions for elections may be filed. Some statutes prohibit the filing of a petition during the term of a collective bargaining agreement or within 60 or 90 days prior to the termination of the agreement. This type of a time limitation, while patterned after the procedure utilized by the National Labor Relations Board, is not as advantageous as it sounds, since unlike private employment, there are conditions other than the expiration date of the collective bargaining agreement which must be considered. For example, the budgetary deadline date of the municipality involved is not generally identical to the expiration date of the agreement. Collective bargaining in public employment is usually a longer process than it is in private employment for the simple reason that in private employment there is usually an individual or a committee which is consistently available for negotiations. In public employment many of the committees of elected officials may directly participate in the collective bargaining process, and they are not so readily available as are their counterparts in private employment. We have experienced this difficulty in Wisconsin in school boards, county boards and city councils, and generally the elected officials desire to meet only at night since they must make their livelihood through private endeavors to which they devote their daytime efforts.

In Wisconsin our agency has adopted, by decisions, certain policies with respect to procedures to establish representative status. We do not require a showing of interest where there presently exists no recognized or certified representative. Many of the statutes require a showing of interest somewhere in the neighborhood of 30 percent to accompany the petition for

election. In Wisconsin we do, however, require a showing of interest of 30 percent where there presently exists a recognized or certified collective bargaining representative. We have also adopted a contract bar principle, and we will not process election petitions unless the petition is filed within a specified period prior to the date set forth in the expiration of the agreement. If the agreement is a two-year agreement and a petition is filed during the first year of the agreement, the contract is deemed to be a bar to the present determination of the representatives.

To those states anticipating public employee collective bargaining statutes, I would recommend, in the area of the points of my discussion, that the statute create an independent, full-time agency to administer the statute; I would also recommend that the statute provide for exclusive representation by a union selected by a majority of the employees in an appropriate bargaining unit to be determined by the agency within its discretion under certain general guidelines established in the statute. The statute should also contain general provisions with regard to permissible voluntary recognition, if the unit is otherwise appropriate, of the majority organization, and procedures for the establishment of such representative status through a secret ballot election or elections if necessary; at the same time the statute should permit the agency to adopt rules of procedure with respect to representation proceedings.

I hope that my remarks with regard to the smorgasbord established by the various statutes reviewed has given you food for thought, and has whetted your appetite sufficiently to cook up a lively, but not heated discussion on issues with regard to appropriate collective bargaining units and questions concerning representation.

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